



REPORT TO LAW & LEGISLATION COMMITTEE City of Sacramento

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915 I Street, Sacramento, CA 95814-2671

STAFF REPORT
May 6, 2008

Honorable Members of the
Law and Legislation Committee

Subject: City Positions on June 2008 State Primary Election Ballot Measures

Location/Council District: Citywide

Recommendation:

This report recommends that the Law and Legislation Committee approve staff recommendations or provide direction regarding a City position on Propositions 98 and 99 on the June statewide primary election ballot and forward to the Mayor/Council for adoption.

Contact: Michelle Heppner, Special Projects Manager, 808-1226
Cindy Cavanaugh, Assistant Director, SHRA, 440-1317

Presenters: Michelle Heppner, Special Projects Manager, 808-1226

Department: City Manager's Office and SHRA

Organization No: 0310

Summary:

Two propositions on the June 3, 2008 State primary election ballot constrain local government's ability to use eminent domain, but they differ substantially in their impact on local government's ability to control land use and protect public health and safety. This report provides a short description of each ballot measure, the recommendation by the League of California Cities, and the recommendation of staff on a City position for each proposition.

Committee/Commission Action: None.

Background Information:

City and SHRA staff reviewed the two measures on the June 2008 State primary election ballot. In developing recommendations, staff considered whether the measures would adversely affect the City and its redevelopment agency.

The two state primary election ballot measures and the recommended positions are:

Measure	Title	League of CA Cities Position	Recommended City Position
Proposition 98	Government Acquisition, Regulation of Private Property. Constitutional Amendment	Oppose	Oppose
Proposition 99	Eminent Domain. Acquisition of Owner-Occupied Residence. Constitutional Amendment	Support	Support

A Summary Statement, copies of selected legal opinions, and copies of the propositions as they will appear on the ballot are provided in the attachments to this report.

The following is a brief summary and analysis of primary local impacts of each of the propositions:

PROPOSITION 98 – GOVERNMENT ACQUISITION, REGULATION OF PRIVATE PROPERTY.

Staff Recommendation: **OPPOSE**

This measure amends the State Constitution to (1) constrain state and local governments' authority to take private property and (2) phase out rent control. Through its expansive definitions of "private use" and "takings," it will prohibit local governments from implementing numerous land use regulations and ordinances to protect the public health and safety and the environment, and transfer the costs of new public improvements in new growth areas to tax payers.

Local Impacts:

Proposition 98 would invalidate the City's Mixed Income Housing Ordinance and severely constrain historic preservation, condominium conversion and zoning ordinances regulating blight and neighborhood nuisances. The City could not exercise the power of eminent domain to acquire property for public water projects, open space or the protection of endangered species or other habitat, among other prohibitions.

PROPOSITION 99 – EMINENT DOMAIN. ACQUISITION OF OWNER-OCCUPIED RESIDENCE.

Staff Recommendation: **SUPPORT**

This constitutional amendment limits state and local governments' use of eminent domain to acquire an owner-occupied single-family home (including a condominium) for the purpose of transferring it to another private party (such as a person, business, or association). This prohibition, however, would not apply if government were acquiring the property for a public work or improvement, abating a nuisance, protecting public health and safety, preventing serious and repeated criminal activity, responding to an emergency, or remediating hazardous materials.

Local Impacts:

The City and its redevelopment agency do not usually acquire owner-occupied single family housing through eminent domain for transfer to another private party, absent a public health or safety need, as described above.

Financial Considerations:

Adoption of Proposition 98 would have far-reaching negative effects on the City's financial condition. As the League of California Cities and California Redevelopment Association have stated, the Proposition will lead to thousands of frivolous lawsuits and paralyze approval of new homes, business, and other projects:

In the definitions section of Proposition 98 is a clause that would prohibit laws and regulations that "transfer an economic benefit to one or more private persons at the expense of the private owner." Because the courts have ruled that virtually all land-use decisions transfer economic benefit from one party to another, Proposition 98 would lead to countless lawsuits that will tie up project approvals for years.... At a minimum, cities and counties will likely be paralyzed for years while this measure gets litigated to the highest levels of the courts - stalling approval of needed economic growth and development. (See the Attachment, "Summaries of the California Property Owners and Farmland Protection Act (Proposition 98) and the Homeowners and Private Property Protection Act (Proposition 99)").

This prohibition against the "transfer of economic benefit" would make unconstitutional virtually all regulation of land use unless just compensation is paid. For example, the City's Mixed-Income Housing Ordinance requires developers in new growth areas to participate in the financing of affordable homes. Under Proposition 98, this ordinance would be unconstitutional. Without the developer's contribution, the financing gap would fall to the City, greatly reducing the feasibility of economically diverse neighborhoods in new growth areas. The same conditions would apply to nuisance regulations, such as limiting the hours of a liquor store in a residential neighborhood. The owner could claim the regulation is a transfer of economic benefit to persons in the neighborhood.

Environmental Considerations:

None.

Policy Considerations:

The recommended positions are consistent with the Council's adopted legislative principles related to retaining local control over issues impacting the City and supporting opportunities for partnerships and additional revenues.

Emerging Small Business Development (ESBD):

None.

Respectfully Submitted by: _____


Michelle Heppner
Special Projects Manager

Approved by: _____


Patti Bisharat
Director of Governmental Affairs

Recommendation Approved:


RAY KERRIDGE
City Manager

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SUMMARY STATEMENT ON THE EFFECTS OF PROPOSITION 98

Proposition 98 expands the definition of what constitutes a “taking” under eminent domain provisions of the California Constitution, Article 1, Section 19. Section 19 mirrors the U. S. Constitution’s Fifth Amendment prohibition against taking private property for public use without providing just compensation. This is commonly referred to as the “takings clause” of the Constitution. The purpose of the clause is to guarantee real property owners just compensation when their land is acquired for public use. The California courts construe the California takings clause similarly with the federal Fifth Amendment takings clause.

By its considerable new language and definitions, Proposition 98 would reverse established law on the government’s ability to regulate the use of property for public health, safety, and welfare purposes, including environmental protection. As a result, 157 business, labor, agricultural, environmental, housing, tenant, and public interest organizations from many different economic sectors and political perspectives are opposed to this proposition. A few of them are listed below:

California Chamber of Commerce, League of California Cities, AARP, League of Women Voters, Western Growers Association, Natural Resources Defense Council, CA Police Chiefs Association, CA State Association of Counties, Consumer Federation of America, Golden State Manufactured Home Owners League, National Wildlife Federation, the Trust for Public Land, State Building and Construction Trades Council, Housing California, Association of CA Water Agencies, CA Teachers Association.

Aware that the Proposition’s text creates many interpretative uncertainties, many legal analysts nevertheless believe that Proposition 98 will have manifold impacts on the ability of state and local governments to ensure the safe and orderly development of their communities and protect the environment. The following attachments in this staff report describe these impacts:

- Summaries of the California Property Owners and Farmland Protection Act (Proposition 98) and the Homeowners and Private Property Protection Act (Proposition 99), California Redevelopment Association
- Legal Memo, Review of the California Property Owners and Farmland Protection Act, for Eminent Domain Reform Now, Nielsen, Merksamer, Parrinello, Mueller & Naylor, LLP
- “An Analysis of the Potential Effects on Housing Laws of the ‘California Property Owners and Farmland Protection Act,’” Western Center on Law and Poverty
- Legal Memo on “Howard Jarvis Ballot Initiative, ‘California Property Owners and Farmland Protection Act,’” Shute, Mihaly & Weinberger LLP (concerning environmental protection)

The common threads in all these analyses are Proposition 98's new definitions of terms. A few examples follow:

New definition of "private use:"

- prohibits the government from acquiring property through eminent domain for public water projects, open space, or the protection of endangered species or other habitat
- prohibits any regulation that transfers an economic benefit from the owner to another party. The breadth of this definition potentially includes all zoning regulations including:
 - the regulation of liquor stores in residential neighborhoods
 - the City's Mixed Income Housing Ordinance
 - relocation costs for residents in condominium conversions and SRO conversions
 - historic preservation
 - re-zonings for neighborhood improvement
 - regulations protecting downtown businesses
 - regulations prohibiting the mining of land in a residential area
 - noticing of tenants about rent increases or changes to their leases

New definition of "takings."

- Expressly prohibits rent control and affordable housing ordinances, since those actions limit the price a private owner may charge another party to purchase, occupy or use his property. The consequences are particularly severe for seniors living in rent-controlled mobile home parks. It also eliminates a community's right to provide a balance of housing types affordable to different income levels through inclusionary housing ordinances. The rent control provision alone affects more than one million Californians.
- Transfers the cost of new roads, sewers, flood control improvements, parks and other public improvements in new developments from the private developer to the general tax paying public.
- Effectively precludes the use of eminent domain to revitalize blighted neighborhoods.

To summarize, Proposition 98 appears to have been designed to eliminate or severely constrain what local governments do to protect the health, safety, and welfare of their citizens through their control of land use and related ordinances.

**HOWARD JARVIS
TAXPAYERS
ASSOCIATION**



HOWARD JARVIS, Founder (1903-1986)
ESTELLE JARVIS, Honorary Chairwoman
JON COUPAL, President
TREVOR GRIMM, General Counsel
TIMOTHY BITTLE, Director of Legal Affairs

May 1, 2007

Ms. Patricia Galvan, Initiative Coordinator
Attorney General's Office
1515 K Street, 6th Floor
Sacramento, CA 95814

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Re: California Property Owners and Farmland Protection Act

INITIATIVE COORDINATOR
ATTORNEY GENERAL'S OFFICE

Dear Ms. Galvan:

By this letter, we respectfully request the Attorney General to prepare a title and summary of the chief purpose and points of the California Property Owners and Farmland Protection Act, a copy of which is attached. The undersigned are the proponents of this measure. **We also hereby withdraw Initiative No. 07-0003.** Although our previous initiative and the attached proposal both deal with eminent domain and property rights, there are substantial differences between the two.

Any correspondence regarding this initiative should be directed to Howard Jarvis Taxpayers Association, 921 Eleventh Street, Suite 1201, Sacramento, CA 95814 (916) 444-9950. The proponents' resident addresses are attached to this letter.

Enclosed is the required \$200 filing fee as well as the certification as required by Elections Code Section 18650.

Thank you for your cooperation.

Sincerely,

Doug Mosebar
President, California Farm
Bureau Federation

Sincerely,

Jon Coupal
President Howard
Jarvis Taxpayers
Association

Sincerely,

Jim Nielsen
Chairman, Cal.
Alliance to Protect
Private Property
Rights

SECTION 1. STATEMENT OF FINDINGS

(a) Our state Constitution, while granting government the power of eminent domain, also provides that the people have an inalienable right to own, possess, and protect private property. It further provides that no person may be deprived of property without due process of law, and that private property may not be taken or damaged by eminent domain except for public use and only after just compensation has been paid to the property owner.

(b) Notwithstanding these clear constitutional guarantees, the courts have not protected the people's rights from being violated by state and local governments through the exercise of their power of eminent domain.

(c) For example, the U.S. Supreme Court, in *Kelo v. City of New London*, held that the government may use eminent domain to take property from its owner for the purpose of transferring it to a private developer. In other cases, the courts have allowed the government to set the price an owner can charge to sell or rent his or her property, and have allowed the government to take property for the purpose of seizing the income or business assets of the property.

(d) Farmland is especially vulnerable to these types of eminent domain abuses.

SECTION 2. STATEMENT OF PURPOSE

(a) State and local governments may use eminent domain to take private property only for public uses, such as roads, parks, and public facilities.

(b) State and local governments may not use their power to take or damage property for the benefit of any private person or entity.

(c) State and local governments may not take private property by eminent domain to put it to the same use as that made by the private owner.

(d) When state or local governments use eminent domain to take or damage private property for public uses, the owner shall receive just compensation for what has been taken or damaged.

(e) Therefore, the people of the state of California hereby enact the "California Property Owners and Farmland Protection Act."

SECTION 3. AMENDMENT TO CALIFORNIA CONSTITUTION

Section 19 of Article I of the California Constitution is amended to read:

SEC. 19(a) Private property may be taken or damaged only for a stated public use and when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation. Private property may not be taken or damaged for private use.

(b) For purposes of this section:

(1) "Taken" includes transferring the ownership, occupancy, or use of property from a private owner to a public agency or to any person or entity other than a public agency, or limiting the price a private owner may charge another person to purchase, occupy or use his or her real property.

(2) "Public use" means use and ownership by a public agency or a regulated public utility for the public use stated at the time of the taking, including public facilities, public transportation, and public utilities, except that nothing herein prohibits leasing limited space for private uses incidental to the stated public use; nor is the exercise of eminent domain prohibited to restore utilities or access to a public road for any private property which is cut off from utilities or access to a public road as a result of a taking for public use as otherwise defined herein.

(3) "Private use" means:

(i) transfer of ownership, occupancy or use of private property or associated property rights to any person or entity other than a public agency or a regulated public utility;

(ii) transfer of ownership, occupancy or use of private property or associated property rights to a public agency for the consumption of natural resources or for the same or a substantially similar use as that made by the private owner; or

(iii) regulation of the ownership, occupancy or use of privately owned real property or associated property rights in order to transfer an economic benefit to one or more private persons at the expense of the property owner.

(4) "Public agency" means the state, special district, county, city, city and county, including a charter city or county, and any other local or regional governmental entity, municipal corporation, public agency-owned utility or utility district, or the electorate of any public agency.

(5) "Just compensation" means:

(i) for property or associated property rights taken, its fair market value;

(ii) for property or associated property rights damaged, the value fixed by a jury, or by the court if a jury is waived;

(iii) an award of reasonable costs and attorney fees from the public agency if the property owner obtains a judgment for more than the amount offered by a public agency as defined herein; and

(iv) any additional actual and necessary amounts to compensate the property owner for temporary business losses, relocation expenses, business reestablishment costs, other actual and reasonable expenses incurred and other expenses deemed compensable by the Legislature.

(6) "Prompt release" means that the property owner can have immediate possession of the money deposited by the condemnor without prejudicing his or her right to challenge the determination of fair market value or his or her right to challenge the taking as being for a private use.

(7) "Owner" includes a lessee whose property rights are taken or damaged.

(8) "Regulated public utility" means any public utility as described in Article XII, section 3 that is regulated by the California Public Utilities Commission and is not owned or operated by a public agency. Regulated public utilities are private property owners for purposes of this article.

(c) In any action by a property owner challenging a taking or damaging of his or her property, the court shall consider all relevant evidence and exercise its independent judgment, not limited to the administrative record and without deference to the findings of the public agency. The property owner shall be entitled to an award of reasonable costs and attorney fees from the public agency if the court finds that the agency's actions are not in compliance with this section. In addition to other legal and equitable remedies that may be available, an owner whose property is taken or damaged for private use may bring an action for an injunction, a writ of mandate, or a declaration invalidating the action of the public agency.

(d) Nothing in this section prohibits a public agency or regulated public utility from entering into an agreement with a private property owner for the voluntary sale of property not subject to eminent domain, or a stipulation regarding the payment of just compensation.

(e) If property is acquired by a public agency through eminent domain, then before the agency may put the property to a use substantially different from the stated public use, or convey the property to another person or unaffiliated agency, the condemning agency must make a good faith effort to locate the private owner from whom the property was taken, and make a written offer to sell the property to him at the price which the agency paid for the property, increased only by the fair market value of any improvements, fixtures, or appurtenances added by the public agency, and reduced by the value attributable to any removal, destruction or waste of improvements, fixtures or appurtenances that had been acquired with the property. If property is repurchased by the former owner under this subdivision, it shall be taxed based on its pre-condemnation enrolled value, increased or decreased only as allowed herein, plus any inflationary adjustments authorized by subdivision (b) of Section 2 of Article XIII A. The right to repurchase shall apply only to the owner from which the property was taken, and does not apply to heirs or successors of the owner or, if the owner was not a natural person, to an entity which ceases to legally exist.

(f) Nothing in this section prohibits a public agency from exercising its power of eminent domain to abate public nuisances or criminal activity;

(g) Nothing in this section shall be construed to prohibit or impair voluntary agreements between a property owner and a public agency to develop or rehabilitate affordable housing.

(h) Nothing in this section prohibits the California Public Utilities Commission from regulating public utility rates.

(i) Nothing in this section shall restrict the powers of the Governor to take or damage private property in connection with his or her powers under a declared state of emergency.

SECTION 4. IMPLEMENTATION AND AMENDMENT

This section shall be self-executing. The Legislature may adopt laws to further the purposes of this section and aid in its implementation. No amendment to this section may be made except by a vote of the people pursuant to Article II or Article XVIII.

SECTION 5. SEVERABILITY

The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

SECTION 6. EFFECTIVE DATE

The provisions of this Act shall become effective on the day following the election ("effective date"); except that any statute, charter provision, ordinance, or regulation by a public agency enacted prior to January 1, 2007, that limits the price a rental property owner may charge a tenant to occupy a residential rental unit ("unit") or mobile home space ("space") may remain in effect as to such unit or space after the effective date for so long as, but only so long as, at least one of the tenants of such unit or space as of the effective date ("qualified tenant") continues to live in such unit or space as his or her principal place of residence. At such time as a unit or space no longer is used by any qualified tenant as his or her principal place of residence because, as to such unit or space, he or she has: (a) voluntarily vacated; (b) assigned, sublet, sold or transferred his or her tenancy rights either voluntarily or by court order; (c) abandoned; (d) died; or he or she has (e) been evicted pursuant to paragraph (2), (3), (4) or (5) of Section 1161 of the Code of Civil Procedure or Section 798.56 of the Civil Code as in effect on January 1, 2007; then, and in such event, the provisions of this Act shall be effective immediately as to such unit or space.

May 10, 2007

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**INITIATIVE COORDINATOR
ATTORNEY GENERAL'S OFFICE**

VIA PERSONAL DELIVERY

The Honorable Edmund G. Brown, Jr.
Attorney General
1300 I Street
Sacramento, CA 95814

Attention: Patricia Galvan, Initiative Coordinator

Re: Request for Title and Summary- Initiative Constitutional Amendment

Dear Mr. Brown:

I am one of the proponents of the attached initiative constitutional amendment. Pursuant to Article II, Section 10(d) of the California Constitution and Section 9002 of the Elections Code, I hereby request that a title and summary be prepared. Enclosed is a check for \$200.00. My residence address is attached. I also withdraw Initiative No. 07-0006.

All inquires or correspondence relative to this initiative should be directed to Nielsen, Merksamer, Parrinello, Mueller & Naylor, LLP, 1415 L Street, Suite 1200, Sacramento, CA 95814; Attention: Steve Lucas (telephone: 415/389-6800).

Thank you for your assistance.

Sincerely,

Christopher K. McKenzie, Proponent

Enclosure: Proposed Initiative

May 10, 2007

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**INITIATIVE COORDINATOR
ATTORNEY GENERAL'S OFFICE**

VIA PERSONAL DELIVERY

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Attorney General
1300 I Street
Sacramento, CA 95814

Attention: Patricia Galvan, Initiative Coordinator

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Thank you for your assistance.

Sincerely,

Susan Smartt, Proponent

Enclosure: Proposed Initiative

May 10, 2007

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**INITIATIVE COORDINATOR
ATTORNEY GENERAL'S OFFICE**

VIA PERSONAL DELIVERY

The Honorable Edmund G. Brown, Jr.
Attorney General
1300 I Street
Sacramento, CA 95814

Attention: Patricia Galvan, Initiative Coordinator

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All inquires or correspondence relative to this initiative should be directed to Nielsen, Merksamer, Parrinello, Mueller & Naylor, LLP, 1415 L Street, Suite 1200, Sacramento, CA 95814; Attention: Steve Lucas (telephone: 415/389-6800).

Thank you for your assistance.

Sincerely,

Kenneth Willis, Proponent

Enclosure: Proposed Initiative

TITLE: This measure shall be known as the “Homeowners and Private Property Protection Act.”

SECTION 1: PURPOSE AND INTENT

By enacting this measure, the people of California hereby express their intent to:

- A. Protect their homes from eminent domain abuse.
- B. Prohibit government agencies from using eminent domain to take an owner-occupied home to transfer it to another private owner or developer.
- C. Amend the California Constitution to respond specifically to the facts and the decision of the U.S. Supreme Court in *Kelo v. City of New London*, in which the Court held that it was permissible for a city to use eminent domain to take the home of a Connecticut woman for the purpose of economic development.
- D. Respect the decision of the voters to reject Proposition 90 in November 2006, a measure that included eminent domain reform but also included unrelated provisions that would have subjected taxpayers to enormous financial liability from a wide variety of traditional legislative and administrative actions to protect the public welfare.
- E. Provide additional protection for property owners without including provisions, such as those in Proposition 90, which subjected taxpayers to liability for the enactment of traditional legislative and administrative actions to protect the public welfare.
- F. Maintain the distinction in the California Constitution between Section 19, Article I, which establishes the law for eminent domain, and Section 7, Article XI, which establishes the law for legislative and administrative action to protect the public health, safety and welfare.
- G. Provide a comprehensive and exclusive basis in the California Constitution to compensate property owners when property is taken or damaged by state or local governments, without affecting legislative and administrative actions taken to protect the public health, safety and welfare.

SECTION 2: AMENDMENT TO THE CALIFORNIA CONSTITUTION

Section 19 of Article I of the California Constitution is hereby amended to read:

Sec. 19. (a) Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.

(b) *The State and local governments are prohibited from acquiring by eminent domain an owner-occupied residence for the purpose of conveying it to a private person.*

(c) Subdivision (b) of this Section does not apply when State or local government exercises the power of eminent domain for the purpose of protecting public health and safety; preventing serious, repeated criminal activity; responding to an emergency; or remedying environmental contamination that poses a threat to public health and safety.

(d) Subdivision (b) of this Section does not apply when State or local government exercises the power of eminent domain for the purpose of acquiring private property for a Public work or improvement.

(e) For the purpose of this Section:

- 1. "Conveyance" means a transfer of real property whether by sale, lease, gift, franchise, or otherwise.*
- 2. "Local government" means any city, including a charter city, county, city and county, school district, special district, authority, regional entity, redevelopment agency, or any other political subdivision within the State.*
- 3. "Owner-occupied residence" means real property that is improved with a single family residence such as a detached home, condominium, or townhouse and that is the owner or owners' principal place of residence for at least one year prior to the State or local government's initial written offer to purchase the property. Owner-occupied residence also includes a residential dwelling unit attached to or detached from such a single family residence which provides complete independent living facilities for one or more persons.*
- 4. "Person" means any individual or association, or any business entity, including, but not limited to, a partnership, corporation, or limited liability company.*
- 5. "Public work or improvement" means facilities or infrastructure for the delivery of public services such as education, police, fire protection, parks, recreation, emergency medical, public health, libraries, flood protection, streets or highways, public transit, railroad, airports and seaports; utility, common carrier or other similar projects such as energy-related, communication-related, water-related and wastewater-related facilities or infrastructure; projects identified by a State or local government for recovery from natural disasters; and private uses incidental to, or necessary for, the Public work or improvement.*
- 6. "State" means the State of California and any of its agencies or departments.*

SECTION 3. By enacting this measure, the voters do not intend to change the meaning of the terms in subdivision (a) of Section 19, Article I of the California Constitution, including, without limitation, "taken," "damaged," "public use," and "just compensation," and deliberately do not impose any restrictions on the exercise of power pursuant to Section 19, Article I, other than as expressly provided for in this measure.

SECTION 4. The provisions of Section 19, Article I, together with the amendments made by this initiative, constitute the exclusive and comprehensive authority in the California Constitution for the exercise of the power of eminent domain and for the payment of compensation to property owners when private property is taken or damaged by state or local government. Nothing in this initiative shall limit the ability of the Legislature to provide compensation in addition to that which is required by Section 19 of Article I to property owners whose property is taken or damaged by eminent domain.

SECTION 5. The amendments made by this initiative shall not apply to the acquisition of real property if the initial written offer to purchase the property was made on or before the date on which this initiative becomes effective, and a resolution of necessity to acquire the real property by eminent domain was adopted on or before 180 days after that date.

SECTION 6. The words and phrases used in the amendments to Section 19, Article I of the California Constitution made by this initiative which are not defined in subdivision (d), shall be defined and interpreted in a manner that is consistent with the law in effect on January 1, 2007 and as that law may be amended or interpreted thereafter.

SECTION 7. The provisions of this measure shall be liberally construed in furtherance of its intent to provide homeowners with protection against exercises of eminent domain in which an owner-occupied residence is subsequently conveyed to a private person.

SECTION 8. The provisions of this measure are severable. If any provision of this measure or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

SECTION 9. In the event that this measure appears on the same statewide election ballot as another initiative measure or measures that seek to affect the rights of property owners by directly or indirectly amending Section 19, Article I of the California Constitution, the provisions of the other measure or measures shall be deemed to be in conflict with this measure. In the event that this measure receives a greater number of affirmative votes, the provisions of this measure shall prevail in their entirety, and each and every provision of the other measure or measures shall be null and void.

Summary of California Property Owners and Farmland Protection Act, Proposition 98

The Howard Jarvis Taxpayers Association, the California Farm Bureau Federation and the California Alliance to Protect Private Property Rights are sponsoring Proposition 98 on the June 2008 ballot, which would make major changes to laws governing use of property, including use of eminent domain and regulation of land use.

Governmental Regulations Affecting the Price of Private Property

The initiative provides that a government regulation that limits the price a private owner may charge another person to purchase, occupy or use his or her real property requires the payment of just compensation. This includes rent control ordinances¹ and inclusionary housing ordinances.

Limitation on Use of Eminent Domain for Consumption of Natural Resources

The initiative would prohibit the use of eminent domain to “transfer the ownership, occupancy or use of private property...to a public agency for the consumption of natural resources...” This provision can be read, for example, to prohibit the use of eminent domain by a city to acquire new drinking water resources. The initiative would also prohibit the use of eminent domain if the public agency would use the property for “the same or substantially similar use as that made by the private owner.” This provision would likely eliminate eminent domain as a tool to acquire conservation and open space easements.

Land Use Regulations

The initiative prohibits a public agency from regulating the use of private property if the regulation transfers an economic benefit from the regulated property owner to another private property owner. Nearly all traditional land use regulations economically benefit some properties while burdening others. Read literally, this provision would make unconstitutional virtually all regulation of land use.

Changes to the use of Eminent Domain

- **Property may not be taken and then transferred to a private party.** This would end the use of eminent domain by redevelopment agencies except for public works projects and prevent its use by other public agencies that wish to establish a public-private partnership for facilities such as toll roads and prisons.
- **The definition of “just compensation” is changed.** The existing law provides reasonable certainty to both the public agency and the private property owner thereby reducing the need to go to court to determine “just compensation.” The initiative will likely require more frequent recourse to the courts to understand how to apply the new definition. In addition, the initiative requires a public agency to pay the property owner’s attorney’s fees if the jury awards one dollar more than the amount offered by the public agency. It also includes

¹ Rent controlled units as of January 1, 2007, would be grandfathered, but only for so long as at least one of the tenants continues to live in the unit as their principal place of residence.

elements not currently recognized such as temporary business losses in the calculation of “just compensation.”

- **Acquiring immediate possession of property made more complicated.** Under existing law, a public agency may deposit the estimated just compensation and gain immediate possession of the property. The property owner is limited to challenging what constitutes “just compensation” if the deposit is withdrawn. Under the initiative, the property owner will also be able to challenge whether the public agency has a right to take the property. This means that it would be possible for a public agency to take immediate possession of the property and for a court to subsequently rule that the public agency had no underlying right to acquire the property at all.
- **Balance of power shifted to courts.** When a public agency makes findings explaining the need to exercise eminent domain, those findings are entitled to a strong presumption of validity when challenged in court. In addition, the court is limited to reviewing the administrative record that was before the public agency. The initiative changes this balance of power between the legislative and judicial branches of government by removing the presumption of validity and allowing the property owner to introduce evidence to the court that was not previously a part of the administrative record before the public agency.

Summary of California Property Owners and Farmland Protection Act, Proposition 98

The Howard Jarvis Taxpayers Association, the California Farm Bureau Federation and the California Alliance to Protect Private Property are sponsoring Proposition 98 on the June 2008 ballot, which would make major changes to laws governing use of property, including use of eminent domain and regulation of land use. The initiative would make the following changes to existing law:

Governmental Regulations Affecting Price

The initiative would define a regulation of property that limits the price a private owner may charge another person to purchase, occupy or use his or her real property as a prohibited taking for a private use. This would prohibit rent control ordinances¹ and make unconstitutional inclusionary housing ordinances adopted in many California communities which require new housing development to include units affordable by low- and moderate-income buyers or renters. The effect of this provision on the inclusionary housing provisions of the Community Redevelopment Law is difficult to predict. Redevelopment agencies might still be able to bargain for the provision of affordable units as a condition of agency assistance, but they would not be able to impose such requirements as a matter of law.

Limitation on Use of Eminent Domain for Consumption of Natural Resources

In one of its provisions, the initiative would prohibit the use of eminent domain to “transfer the ownership, occupancy or use of private property...to a public agency for the consumption of natural resources...” This provision can be read, for example, to prohibit the use of eminent domain by a city to acquire new drinking water resources. The initiative would also prohibit the use of eminent domain if the public agency would use the property for “the same or substantially similar use as that made by the private owner.” This provision would likely eliminate eminent domain as a tool to acquire conservation and open space easements.

Regulation of Land Use

The initiative requires a public agency to pay “just compensation” when it regulates the use of land if the regulation transfers an economic benefit from the person who owns the land to another person. Under existing law, public agencies use their police power to enact regulations governing the use of privately owned real property. These regulations range from traditional zoning to nuisance regulations and include conditions imposed on the new development of property. Nearly all of these regulations have an economic impact. Some properties are benefited while others are burdened. Read literally, this provision would make unconstitutional virtually all regulation of land use unless just compensation is paid.

Restrictions on the Use of Eminent Domain

1. Property may not be taken and then transferred to a private party. For over 50 years, State and Federal Courts have held that the use of eminent domain by redevelopment agencies to eliminate conditions of blight is a public use. The initiative’s definitions of “taken” and “private use” reverse those cases and prohibit the use of eminent domain where the ownership, occupancy or use of the property acquired is transferred to a private person or entity. This would end the use of eminent domain by redevelopment agencies except for

¹ Rent controlled units as of January 1, 2007, would be grandfathered, but only for so long as at least one of the tenants continues to live in the unit as their principal place of residence.

public works projects. It would also prevent the use of eminent domain by other public agencies in public/private partnerships for facilities such as toll roads and privately-run prisons.

2. **New definition of “just compensation.”** Existing law requires the payment of just compensation to the owner of property taken by eminent domain. “Just compensation” is defined in the Eminent Domain Law (a statute) as “fair market value.” A body of well-established law interpreting the meaning of “just compensation” allows both public agencies and property owners to be reasonably certain about the value of property to be acquired. In large part because the value of the property is predictable, an acquisition usually does not require the use of eminent domain and rarely will an eminent domain case actually go to trial. The initiative would add a constitutional definition of “just compensation” that would prevail over this settled body of law. This will probably result in the need to have more frequent recourse to the courts to settle disputes over the meaning of “just compensation.” Among the other changes that the initiative would make are the following:
 - a. Just compensation would include an award of the property owner's attorney's fees if the jury awards one dollar more than the amount offered by the public agency. It is unclear which offer to purchase this provision refers to.
 - b. Just compensation would include elements not currently recognized such as temporary business losses. Relocation and other business re-establishment costs would also be elevated to constitutional status, thereby perhaps abrogating existing statutes which place limits on the type and amount of such expenses for which compensation must be paid.
3. **Acquiring “immediate possession” of property made more complicated.** Under existing law, after depositing with the court the estimated just compensation, a public agency can obtain possession of property prior to a final judgment based on a showing of an overriding need for the condemnor to take possession prior to final judgment. If the property owner withdraws the deposit, he or she waives their right to contest whether the taking is for a public use but may still contest the amount of just compensation. The initiative would change this approach to prejudgment possession by permitting the property owner to contest both public use and just compensation after withdrawing the deposit. This would make the use of prejudgment possession more problematic for public agencies since they would still be at risk of being prohibited from taking the property (if they lose the right to take issue) rather than simply paying more for it.
4. **Balance of power shifts.** Under existing law, when a public agency makes findings in connection with the taking of property by eminent domain, those findings are entitled to strong presumptions of validity. Courts will overturn those findings only where the property owner is able to demonstrate a gross abuse of discretion, such as bribery or fraud. Courts are also limited to reviewing the administrative record before the public agency. These rules are rooted in concepts of separation of powers—the respect that co-equal branches of government have for the other's proceedings. The initiative would provide that a court must exercise its independent judgment and give no deference to the findings of the public agency. The court's inquiry would also not be limited to the administrative record, and so the property owner could introduce evidence of value and other matters not before the condemning agency at the time the decision to condemn was made.

Summary of the Homeowners and Private Property Protection Act, Proposition 99

The Homeowners and Private Property Protection Act is an initiative constitutional amendment supported by substantially the same coalition of local government, environmental and business interests that opposed Proposition 90 in 2006. It will be on the June 2008 ballot as Proposition 99. The initiative would make the following changes to existing law:

Restrictions on the Use of Eminent Domain

Under existing law, a redevelopment agency may acquire a privately owned single-family home and resell it to a private developer for redevelopment in order to eliminate blight. In direct response to public concerns raised following the United States Supreme Court's decision in *Kelo vs. City of New London*, the initiative would amend the California Constitution to prohibit a redevelopment agency, the State, or any local government from using eminent domain to acquire an owner-occupied, single-family residence and resell it to a private person. "Owner-occupied, single-family residence" is defined as real property improved with a single-family residence (including a condominium or townhouse) that is the owner's principal place of residence for at least one year prior to the State or local government's initial written offer to purchase the property.

Exceptions

The prohibition on using eminent domain to acquire an owner-occupied, single-family home for resale to a private party would not apply if the acquisition is for a public work or improvement. A "public work or improvement" is defined to include what have been traditionally viewed as public facilities, including those that may be constructed or operated as public/private partnerships (e.g., toll roads). The initiative would also not apply if the acquisition was to abate a nuisance, protect public health and safety from building, zoning or other code violations, prevent serious, repeated criminal activity, respond to an emergency, or remediate hazardous materials.

Effective Date

If passed, the measure would take effect the day following the election on June 3, 2008. The amendments made by this initiative shall not apply to the acquisition of real property if the initial written offer to purchase the property was made on or before the date on which it becomes effective, and a resolution of necessity to acquire the real property by eminent domain is adopted on or before 180 days after that date.

Construction with Other Measures

The initiative provides that if it appears on the same ballot with another initiative measure dealing with the same or similar subject and both measures pass, this measure will prevail

over the other if it receives more votes than the other measure. In such event, the provisions of the other measure will be null and void.

Summary of the Homeowners and Private Property Protection Act, Proposition 99

The Homeowners and Private Property Protection Act is an initiative constitutional amendment supported by substantially the same coalition of local government, environmental and business interests that opposed Proposition 90 in 2006. It will appear on the June 2008 ballot as Proposition 99. The initiative would make the following changes to existing law:

Restrictions on the Use of Eminent Domain

Under existing law, redevelopment agencies may acquire privately owned real property, including single-family homes, located in adopted redevelopment project areas found to be blighted under definitions found in the Community Redevelopment Law. Property thus acquired may be resold to private developers for redevelopment in order to eliminate blight. The ability of units of local government in California, other than a redevelopment agency, to use eminent domain to acquire property for resale to private parties is untested and unknown. In California, the only existing, explicit statutory delegation of the power of eminent domain to acquire property for resale to private parties is found in the Community Redevelopment Law. This distinguishes California from a state such as Connecticut—where the recent case of *Kelo vs. the City of New London* was decided—that has specific statutory authorization enabling units of local government to use eminent domain for economic development purposes regardless of blight findings. California has no comparable enabling statute.

The measure would amend the California Constitution to prohibit the use of eminent domain by the State or a local government to acquire an owner-occupied, single-family residence for transfer to a private person. "Owner-occupied residence" is defined as real property improved with a single family residence (including a condominium or townhouse) that is the owner's principal place of residence for at least one year prior to the State or local government's initial written offer to purchase the property. This restriction would apply to the State and all units of local government, including redevelopment agencies.

Exceptions

The prohibition on the use of eminent domain to acquire single family, owner-occupied homes for resale to private parties would not apply to acquisitions for a public work or improvement. A public work or improvement is defined to include what have been traditionally viewed as public facilities that may be constructed or operated as public/private partnerships (e.g., toll roads). The limitations of the initiative would also be inapplicable when the State or local government exercises the power of eminent domain to abate a nuisance, protect public health and safety from building, zoning or other code violations, prevent serious, repeated criminal activity, respond to an emergency, or remediate hazardous materials.

Effective Date

If passed, the measure would take effect the day following the election on June 3, 2008. The amendments made by this initiative shall not apply to the acquisition of real property if the initial written offer to purchase the property was made on or before the date on which it becomes effective, and a resolution of necessity to acquire the real property by eminent domain is adopted on or before 180 days after that date.

Construction with Other Measures

The initiative contains a provision that if it appears on the same ballot with another initiative measure dealing with the same or similar subject and both measures pass, this measure will prevail over the other if it receives more votes than the other measure. In such event, the provisions of the other measure will be null and void.

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CONFIDENTIAL AND PRIVILEGED
ATTORNEY-CLIENT COMMUNICATION

TO: Eminent Domain Reform Now – Protect Our Homes

FROM: Cathy Christian and Richard Martland

RE: Review of the California Property Owners and Farmland Protection Act
("CPOFPA")

I. OVERVIEW.

You have asked our firm to review the CPOFPA initiative Constitutional amendment as referenced above.

While proponents' literature suggests that this initiative simply provides new restrictions on the use of eminent domain, the provisions of the actual measure reveal a much broader agenda. For instance, this initiative unambiguously eliminates future rent control ordinances.

Additionally, like Proposition 90, this initiative also has dramatic restrictions on zoning and other traditional land use regulations to protect property owners not mentioned in the statements of Findings and Purpose but hidden in a definitional subparagraph. Unlike Proposition 90, which would have required the payment of compensation for a wide array of land use regulations and ordinances, this initiative addresses land use regulations and ordinances in a much more severe way and, in effect, phases out current law over time. It flatly prohibits them without providing any exemption for those intended to protect the public health and safety. This prohibition will fundamentally alter and diminish the role of state and local governments in the regulation of land use, and paralyze land-use decision making that benefits residents and local economies. However, the initiative explicitly retains the right to sue for damages. Public entities will be subject to both actions to set aside decisions and for financial losses.

The initiative also contains a component, in a definitional subparagraph, also not mentioned in the statements of Findings and Purpose, which under ordinary rules of statutory interpretation would prohibit the exercise of eminent domain for the construction of public water projects.

Thus, the CPOFPA goes far beyond limiting eminent domain for private uses. The key prohibition added to the Constitution by the initiative is its insertion of an express provision stating that private property may not be taken or damaged by the government for a private use. On its face, this prohibition merely states what is current law; i.e., private property may only be taken or damaged for a public use, and compensation is required in all cases. It is the initiative's definitions of "taken," "public use" and "private use" that dramatically change the scope of the prohibition and render it more than just a restatement of existing law.

The proposed measure utilizes three new definitions to accomplish substantive changes to the law of eminent domain.

A. NEW DEFINITION OF "PRIVATE USE."

There is no doubt that this new definition of private use would have the farthest reaching and potentially devastating impact on local communities.

"Private Use" – Section 19(c)(3). "Private use" is defined in three distinct ways:

- (i) "Private use" means the transfer of the ownership of private property to a person or entity other than a public agency or regulated public utility. Under this new definition, the government may not use the power of eminent domain to acquire property for a school and then transfer it to a private non-profit organization that will operate the school under a charter.
- (ii) "Private use" means the transfer of ownership to a public agency for consumption of natural resources or for the same or a substantially similar use as that made by the private owner. This means, for example, that a public agency may not exercise the power of eminent domain to acquire property for public water projects, open space or for the protection of endangered species or other habitat.
- (iii) "Private use" means "regulation" of the ownership, occupancy or use of privately owned property in order to transfer an economic benefit to one or more private persons at the expense of the private owner.

The consequences of this new definition of "private use" are manifold. Just to mention a few examples, the sweep of this definition could prohibit the construction of public water projects, the enactment of land use regulations enacted to protect the environment, stop the approval of new economic and housing developments, and even invalidate regulations intended to protect the public's health, safety and welfare. Some examples are:

1. Construction of state and local water projects will be precluded.

By first prohibiting the taking of private property for a private use and then defining “private use” to include the taking by a public agency of private property “for the consumption of natural resources,” the initiative effectively precludes the use of eminent domain for the development of public projects for the delivery of water for irrigation, domestic, commercial and industrial purposes. There can be little doubt that water is considered a “natural resource.” (*Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, 701-02 - “The conservation of other natural resources is of importance, but the conservation of the waters of the state is of transcendent importance.”) And there can be little doubt that the construction of projects to deliver water for domestic use, such as drinking water, irrigation, commercial or industrial uses, reasonably involve the consumption of water. (*Deetz v. Carter* (1965) 2323 Cal.App.2d 851, 854 - domestic use of water includes “consumption for the sustenance of human beings, for household convenience, and the care of livestock.”)

The basic elements of a water project include the acquisition of land for reservoir and pumping sites, borrow areas, right-of-way for pipelines and canals, and in some cases acquisition of riparian water rights. Water simply cannot be made available for “consumption” unless all these elements are present. Thus, defining the term “private property” as the taking by a public agency of private property for the “consumption of natural resources” effectively precludes the use of eminent domain for reservoir sites, canals and other elements of a water project whether it is a state project or local project.

2. Land use regulations and zoning decisions that preserve the environment and protect the public interest are at risk.

Land use zoning and land use regulations have historically been the means by which communities seek to achieve a balance among potentially competing interests such as commercial and residential development, environmental and aesthetic concerns, cultural/historic preservation and adequate/affordable housing. There is not one person in any community that is not affected by zoning and land use regulations.

Through the definition of the term “private use,” the initiative seeks to prohibit the control of land use by the state, cities and counties. In particular, the definition of a prohibited private use includes the “regulation” of private property in order to “transfer the economic benefit” to another private person. The effect of this prohibition would be to invalidate much of the land use planning and environmental protection effort undertaken by communities across the state. The impact is greatly exacerbated by the fact that there is no public health, safety and welfare exception to the general prohibition so local governments would face liability in restricting the use of property in order to protect the public health, safety and welfare.¹

Virtually every zoning and land use regulation balances the needs of one private group versus another. The breadth of this new definition of “private use” potentially includes all zoning regulations since it is widely recognized that all “traditional zoning regulations can

¹ Only actions by the Governor during a declared state of emergency use are exempted.

transfer wealth from those whose activities are prohibited to their neighbors.”(Yee et al. v. City of Escondido, 224 Cal.App.3d 1349 (1990).)

3. New project approvals will be paralyzed or subject to endless lawsuits.

The clause in the definitions section that would prohibit laws and regulations that “*transfer an economic benefit to one or more private persons at the expense of the private owner*” also opens the door to the possibility of a lawsuit over every land use proposal. Because the courts have ruled that virtually all land use decisions can transfer economic benefit from one party to another, the CPOFPA would lead to countless lawsuits that will tie up project approvals for years. Those opposed to development would use this as a “hook” to sue to block new residential or commercial projects, claiming that the proposed project “transfers economic benefit” from one party to another.

One possible consequence of this measure is to preclude re-zoning of property in order to plan for growth consistent with community interests. For example, if land now zoned for residential purposes is re-zoned for commercial purposes, the surrounding homeowners could argue that the re-zoning decision caused a transfer of an economic benefit from them - who will have the potential decrease in their home values caused by nearby commercial development – to the businesses. Developers of new multi-family or owner-occupied properties could be facing the same problem with securing land use approvals for proposals for such housing as some adjacent owners, because they are opposed to further development in their neighborhood, typically argue that such use bring traffic congestion and activities that devalue their property.

Likewise, zoning laws intended to prevent inner city decay through zoning restrictions would also be at risk. Many communities have enacted regulations to protect “downtown businesses” and locally-owned essential businesses such as grocery and hardware stores by limiting the size of “super-stores” whose volume and size give them a competitive edge that ultimately forces the existing facilities to close. Just this June, the California Supreme Court reaffirmed prior court decisions finding these purposes to be legitimate under current law. (Hernandez v. City of Hanford (June 2007) 41 Cal.4th 279, 291.) In rendering its decision the court stated: “... planning and zoning ordinances traditionally seek to maintain property values, protect tax revenues, provide neighborhood social and economic stability, attract business and industry and encourage conditions which make a community a pleasant place to live and work.”

At a minimum, it is clear that this provision could paralyze local land-use planning, or result in endless lawsuits by both those promoting new projects and those opposing new economic or housing developments.

4. Regulations intended to protect the environment will be eliminated.

The initiative will have a severe impact on environmental regulation. The list of environmental protections put at risk by this measure is quite broad, but following are just a few examples of laws and regulations that protect the environment that will be prohibited:

- Regulations requiring compliance with a stream set-back regulation in order to protect the water supply and quality of the down-stream owners;
- Regulations prohibiting mining of land in a residential area; and
- Regulations controlling noise and light pollution that affect neighborhoods and protect wildlife habitat.

5. The enforcement of regulations intended to protect the public's health, safety and welfare are threatened.

This measure even goes so far as to prohibit local government regulations intended to protect the public's health, safety and welfare because there is no exception for these purposes to the new definition of private use. This means that any number of regulations at the local level could be successfully challenged. These include:

- Regulation of the operating hours of liquor stores, or bars and nightclubs in residential areas, even if the bar or nightclub had a history of noise, litter and loitering.
- Ordinances limiting types of businesses (factories, industrial) that are permitted near homes and that produce noise and traffic congestion that can reduce home values.
- Height limitations on new developments in order to protect the views and value of adjacent residential properties.

The public safety implications of this measure are dramatic. Recently, a California trial court held that it was permissible for a city to block development of down-slope property for residential uses because of the unstable nature of the soil. The surrounding property owners benefited from the city's effort to preclude dangerous disturbance of the soil and thus, under the proposed measure's ban on "transferring economic benefits," the city's ban would have been unconstitutional. Under the initiative's definition of private use the City would have been barred from restricting development of the hazardous site.

6. Taxpayer implications: the State, Cities and Counties would be financially at risk for most land use decisions.

Although the initiative, unlike Proposition 90, does not address compensation, it expands the potential for liability under existing law. Pursuant to this measure, a governmental entity that undertakes a broad array of official land use actions can be deemed to have "taken" property constitutionally, requiring taxpayers to compensate the property owner whose property is affected. Moreover, while an unconstitutional taking of real property is compensable under existing law at fair market value, the initiative provides no standard for valuing "damage" to property. Instead, the initiative merely states that just compensation for the damage to property will be the value fixed by a jury or the court.

If this initiative is approved, land use decisions that would have otherwise been permissible will have to be reconsidered or the deciding agency risks the fiscal peril of guessing wrong about whether “an economic benefit is transferred ... at the expense of the property owner.” Cash-strapped cities and counties will be faced with great uncertainty in assessing their choices to fairly balance land use concerns in their communities. Potential fiscal liability can be a significant factor contributing to gridlock in the decision-making process. Furthermore, communities may require property owners or developers to assume the financial risk of changes to existing land use regulations through indemnity agreements as a condition of approval of any new land use changes.

7. The measure would impact a wide-variety of tenant protection laws.

There are currently many statutes that seek to provide some certainty and balance with regard to landlord/tenant relations. These include things like noticing tenants about rent increases, terminating tenancy, and other changes to the lease agreement. Under the initiative, these statutes could all be construed as transferring economic benefit and invalidated.

B. NEW DEFINITION OF “TAKEN.”

“Taken” – Section 19(b)(1). The proposed measure defines this term to now include (1) transferring the ownership of private property to a public agency or to any person or entity other than a public agency; and (2) limiting the price a private owner may charge another person to purchase, occupy or use his or her real property. There are some significant consequences to this new definition. Some examples are:

1. The measure expressly eliminates rent control and affordable housing ordinances.

The initiative unambiguously targets rent control ordinances. In its definition of “taken,” the initiative includes “limiting the price a private owner may charge another person to purchase, occupy or use his or her real property.” While the initiative would grandfather units or mobile home spaces occupied by tenants on January 1, 2007 until the tenants vacated their units or spaces, rent control would thereafter no longer be permissible. Current tenants who live in rent controlled housing units or mobile home spaces must either remain in the units they occupied on January 1, 2007 or lose the protection of rent control.

This could have devastating consequences for seniors, who often live on a fixed income which is further reduced after the death of a spouse. For example, if a woman who lived in a three bedroom, rent-control protected unit with her husband is forced to move into a smaller unit after his death, this measure would mean that the widow would lose her rent control protections and face further financial hardship.

Similarly, the measure would eliminate affordable housing ordinances to the detriment of seniors on fixed income and others of limited financial means. In order to provide a balance of housing types affordable to different income levels, many communities have adopted ordinances

requiring certain percentages of new housing units to be affordable by low and moderate income families. These ordinances would be unconstitutional under the measure.

2. The measure will transfer to taxpayers the development costs of new roads, streets and parks.

Neither the federal nor state constitutions define "taken." Its meaning has been developed over decades through judicial interpretation. The initiative expressly defines "taken" to include, without qualification, any transfer of private property to a public agency. New development is typically conditioned upon the "transfer of private property" to a public agency for streets, parks and other public improvements. Under both the federal and state constitutions, these types of conditions do not constitute "takings."

This new, expansive definition of "taken" could mean that the government will have to pay a developer to acquire the property needed to provide streets, parks and other public improvements that are only needed because of its development. The new definition of "taken" could shift to the taxpayers the costs associated with the public's acquisition of property for, and the construction of, the miles of roads, streets, curbs and gutters, sewers, flood control improvements, traffic signals, street lights, parks and other public improvements necessitated by new development.

3. The measure imposes severe restrictions on urban revitalization projects.

The effect of this definition will be to preclude the use of eminent domain to revitalize areas of urban decay. By prohibiting transfer of condemned property to a private person, urban revitalization projects such as the Gaslamp District in San Diego or the Franklin Villa Area of South Sacramento would become impossible. In the Franklin Villa project eminent domain was used as a last resort to transform a slumlord-owned property into privately built affordable housing and a community that residents are proud of.

C. NEW DEFINITION OF "PUBLIC USE."

"Public use" – Section 19(b)(2). The term public use is limited to use and ownership by a public agency or regulated public utility, including public facilities, public transportation, and public utilities. This definition, like that of "taken," would effectively preclude private participation in efforts to eliminate urban decay or public/private partnerships.

II. CONCLUSION

Without a doubt, CPOFPA is even more deceptive and draconian than Proposition 90. With the exception of the rent control feature, the regulatory prohibitions concerning land use decisions and the prohibition against the use of eminent domain for the acquisition of private property for the consumption of natural resources are buried in the definition of private use. But the impact is nonetheless dramatic. Those obscure provisions are the only reference in the initiative to any form of "regulation" or prohibition against taking property for the "consumption of natural resources." Because of the prohibitory nature of the regulatory and eminent domain

provisions, the initiative appears to be designed to eliminate much of what government does to protect the public health, safety and welfare through the control of land use and the provision of water. If there is any doubt on that point, the initiative Constitutional amendment provides the express right to seek injunctive relief against any action that violates its terms.

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An Analysis of the Potential Effects on Housing Laws of the “The California Property Owners and Farmland Protection Act”

“The California Property Owners and Farmland Protection Act” is a proposed voter initiative that would amend Article I, Section 19 of the California Constitution. The initiative would change California law governing eminent domain, but would also make sweeping changes to other housing-related laws. Intentionally or otherwise, if passed, the initiative could undo centuries of real property law and consumer/tenant protections. This memorandum addresses changes in state and local housing laws, should the initiative pass. It will examine:

- ◆ Changes *certain* to occur.
- ◆ Changes *likely* to occur.
- ◆ Changes *possible* if the courts interpret the amendment broadly.

The following summary of outcomes of the initiative is keyed by number to the section of the memorandum with a more complete discussion:

Certain Changes	2
1. Elimination of local residential and mobilehome rent-stabilization laws, including those enacted by voters	2
2. Invalidation of state law intended to mitigate burdens on tenants, when accommodations are withdrawn from the market	4
3. Invalidation of inclusionary housing requirements	4
4. Prohibition on future changes	5
Likely Changes	5
5. Invalidation of tenant notice periods	6
6. Invalidation of protections regarding terminations of tenancies	7
7. Invalidation of a variety of state laws governing the use and occupancy of residential rental property	9
Possible Changes	10
8. Restriction of foreclosure protections and procedures	11
9. Invalidation of fair housing laws	13
10. Deregulation of rental housing	14
11. Deregulation of real estate sales	14
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13. Deregulation of real property law	16
14. The alternative: Buyer beware and absolute freedom of contract	16

Changes to Housing Laws Certain to Occur

1. Elimination of local residential and mobilehome rent-stabilization laws, including those enacted by voters.

The proposed initiative expands the definition of what constitutes a "taking" under eminent domain provisions of the California Constitution, Article 1, Section 19.

Court Interpretations of Taking: Section 19 mirrors the U.S. Constitution's Fifth Amendment prohibition against taking private property for public use without providing just compensation. This is commonly referred to as the "takings clause" of the Constitution. The purpose of the clause is to guarantee real property owners just compensation when their land is taken for public use. The California courts construe the California takings clause congruently with the federal Fifth Amendment takings clause.¹

In determining whether a government regulation of property works as a taking of property under the Fifth Amendment to the United States Constitution, the United States Supreme Court has generally eschewed any set formula for determining whether a taking has occurred, preferring to engage in "essentially ad hoc, factual inquiries",² which focus in large part on the economic impact of the regulation.³ The U.S. Supreme Court has also held categorically that property is taken when a government regulation "compel[s] [a] property owner to suffer physical 'invasion' of his property" or "denies all economically beneficial or productive use of land."⁴

The U.S. Supreme Court recently overruled a line of cases that stated that the Fifth Amendment is violated when a land-use regulation does not "substantially advance legitimate state interests," finding that this inquiry was essentially a due process analysis that has no place in takings clause jurisprudence.⁵

Two years ago in *Kelo v. City of New London* (2005) 545 U.S. 469, the U.S. Supreme Court held that private property taken for private development in furtherance of an economic development plan satisfied the "public use" requirement of the Fifth Amendment takings clause. Some argue that *Kelo* represents the nadir of takings jurisprudence, reflecting the increasing weakness of property rights arguments with the Supreme Court.

The Initiative: The proposed initiative would add a sentence to the end of Article I, Section 19's existing language:

"Private property may not be taken or damaged for private use."⁶

In its promotional materials, the proponents state that this language would be added to ensure that the use of eminent domain as authorized by the United States Supreme Court in *Kelo v. City of New London* (that government seizure of a private home so that the home can be transferred outright to a private business or developer) is not allowed in California.

However, the initiative would also add considerable new language, which would do much more than prohibit the use of eminent domain at issue in the *Kelo* case.

¹ See *San Remo Hotel L.P. v. City and County of San Francisco* (2002) 27 Cal.4th 643, 664.

² *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1015.

³ See *Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104, 124; *Keystone Bituminous Coal Association v. DeBenedictis* (1987) 480 U.S. 470, 493-501.

⁴ *Lucas, supra*, 505 U.S. at pp. 1015-1016.

⁵ *Lingle v. Chevron U.S.A. Inc.* (2005) 544 U.S. 528.

⁶ Proposed Cal. Const. art. I, section 19(a).

Most dramatically, the amendment is drafted in a way that uses language that defies normal or legal definition. The use of this novel language within the proposed amendment would effect a change in California law that has nothing to do with the seizure or transfer of property at all; it would forbid local rent-control laws.

In particular, the proposed amendment assigns a novel meaning to the word "taken." A citizen reading the simple, declarative sentence that "private property may not be taken for private use" would think that he or she had a reasonably good idea what that sentence means. Assuming that the sentence uses words in their usual, everyday sense, he or she would understand it to mean only that the government may not seize—actually take possession of—one person's private property and give it to another private property owner. This understanding is supported by the proponents' claim that the amendment's purpose is to prevent what happened in *Kelo* from happening here.

The citizen's understanding of the sentence as used in the proposed amendment would be wrong. The proponents define the word "taken" in a way that expands its meaning far beyond the usual, everyday sense. "Taken" is defined to mean:

"Taken' includes transferring the ownership, occupancy, or use of property from a private owner to a public agency or to any person or entity other than a public agency, or limiting the price a private owner may charge another person to purchase, occupy or use his or her real property."⁷

The last phrase "limiting the price a private owner may charge another person to purchase, occupy, or use his or her real property" greatly expands the definition of the word "taken."

Thus, the statement that "private property may not be taken for private use" would now mean that the government may not enact or enforce local rent control laws.⁸ This language invalidates a regulation that involves no government seizure of property, thus over-reaching the issues and facts of *Kelo*.

The word "taken" as used in the proposed amendment would catch lawyers, including those who specialize in eminent-domain law, equally flat-footed. For, although the word "taken" is a term of art, its specialized legal meaning is closely related to its normal, everyday meaning. Under existing law, private property is "taken" by government regulation only when the regulation is so severe that it is as though the government had actually seized the property altogether.⁹

California and federal courts have long held that the economic regulation of rents through rent control is a legitimate exercise of the police power, and does *not* constitute a "taking."¹⁰ These cases and local rent regulations do require that the landlord be permitted to achieve a reasonable return on his or her investment (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129).

By shoehorning local rent control laws into the definition of "taken" in this way, the proposed amendment would ban local rent control laws as well.

⁷ Proposed Cal. Const. art. I, section 19(b)(1).

⁸ It should be noted that the initiative does retain rent control for current tenants and park residents. However, they are locked in: once they depart, neither their current unit, nor the one they move to, would be subject to any controls.

⁹ See, *Loretto v. Teleprompter Manhattan CATV* (1982) 458 U.S. 419, (per se takings); *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1019, (describing a per se regulatory taking as one that entirely divests an owner of all economically-beneficial use of his or her property); *Masingill v. Department of Food and Agriculture* (2002) 103 Cal. App.4th 498, 507, (defining a non-per se regulatory taking as one in which government regulation goes so far that it might as well have simply taken it altogether).

¹⁰ See *Levy Leasing Co. v. Siegel* (1922) 258 U.S. 242, 245; *Pennell v. City of San Jose* (1988) 485 U.S. 1, 11 (rent control not a facial taking or violation of due process); *Yee v. City of Escondido* (1992) 503 U.S. 519 (rent control does not constitute a taking simply because it transfers value from the landlord to the tenant).

Approximately 1 million California families live in rent-controlled dwellings or mobilehomes. While the initiative does retain rent control for current tenants and park residents, by the proposal's terms, once they move, no control is permitted for them at a new residence, nor any further control on the dwelling vacated.¹¹

One final note: In many cases, rent control was adopted by a vote of the people. The initiative would nullify these protections that were enacted directly by voters.

2. Invalidation of state laws intended to mitigate burdens on tenants, when accommodations are withdrawn from the market.

The effects of such a change in the law as proposed would be broader and deeper than might at first be apparent. Of course, the change would affect all tenants in rent-stabilized mobilehome parks, apartments, and other accommodations. However, it would affect the very poor and those who qualify for rental assistance the most. Under current law, if a landlord in a rent-control jurisdiction terminates a Section 8 contract without cause, he or she may charge that tenant only the "contract rent"; i.e., the combination of the rent that the tenant paid directly plus the additional rental amount provided by the local housing authority.¹² This does not help all low-income tenants, but for those tenants who are able to pay the entire rent temporarily, it allows them some time to locate adequate replacement housing. The effect on the landlord is minimal. If the limitation is made unconstitutional, the disincentive would be eliminated.

The proposed amendment would also invalidate provisions of state law that are intended to mitigate the burdens on the elderly and disabled when their tenancies are terminated in order to make way for new development. Under a state law known as the "Ellis Act,"¹³ the owner of an apartment building has the absolute ability to withdraw the building from the rental market, and thus evict all of the building's tenants. But while conferring this ability on property owners (usually so that they can convert the existing apartments to condominiums or raze the building for new development), state law also recognizes that the owners' exercise of this right may cause considerable hardship to the tenants—especially seniors or disabled—who are displaced. In order to mitigate those hardships, the Ellis Act limits the amount by which a landlord may increase their rents during that year¹⁴

Under the initiative, all of these mitigating regulations would be invalid.

3. Invalidation of Inclusionary Housing Requirements

As noted above, the initiative would prohibit "limiting the price a private owner may charge another person to purchase, occupy or use his or her real property."¹⁵ Thus, any type of mandatory inclusionary requirement such as a local inclusionary zoning ordinance, or ordinance adopted pursuant to the Mello Act (Government Code Section 65590, which sets out affordable housing requirements in the coastal zone) would be prohibited. This is because those types of ordinances require a private developer to limit the rent it charges or limit the sales price of ownership units to private individuals. Under the initiative, such limits would be considered a taking.

Approximately 170 California cities and counties have inclusionary ordinances, which have

¹¹ California Property Owners and Farmland Protection Act, section 6.

¹² Civil Code Section 1954.535.

¹³ Government Code Section 7060 and following.

¹⁴ Government Code Section 7060.4(b)(1).

¹⁵ Proposed Cal. Const. art. I, section 19(b)(1).

resulted in the creation of 30,000 affordable dwellings. This affordable housing stock would no longer be available under the initiative once a dwelling is sold or re-rented, and no further affordable units could be produced.

4. Prohibition on Future Changes

Rent controls have been used temporarily at various times during extreme housing shortages. On the national level, they were imposed as part of general price controls in World War I, World War II, the Korean War, and by President Nixon in 1971 (in response to an inflation rate persisting at 4%, after peaking at 6% the previous year). Although any future federal law would override the California Constitution, the initiative would permanently bar any state or local attempts to respond to emergencies through imposing market controls.

Under the proposed amendment, current law provisions designed to protect the public in case of an emergency or natural disaster would be unconstitutional. Penal Code Section 396 makes it illegal to raise prices by more than 10 percent for necessities (including housing) after a declared emergency or disaster, to prevent price-gouging. Under the initiative, price-gouging would be legal. (Note: the initiative would permit the *Governor* to take or damage property, but the exception does not extend to private use.)

It is also important to note again that many of these local rent control measures were enacted by local vote. Yet the initiative contains no exemption for local controls enacted by vote of the people. Instead, it in effect would substitute the will of distant citizens over local control.

Changes to Housing Laws Likely to Occur

The declarative sentence that “private property may not be taken . . . for private use” is unmoored from its apparent simplicity not only by a novel definition assigned to the word “taken,” but also by an equally unorthodox definition of the phrase “private use.”

The citizen-reader would understand the term “private use,” as used in the proposed constitutional amendment, to mean just what it appears to mean; i.e., a use made of the property by the new, private owner to whom the government has transferred property, à la *Kelo*. The citizen would be wrong.

First, and most basically, the citizen would be wrong to understand the phrase “private use” to be a noun phrase, although it is one under normal rules of grammar. To the contrary, under the proponents' proposed Constitutional language, “private use” is a verb. The proposed amendment's subsection (b)(3):

“Private use” means:

- (i) transfer of ownership, occupancy or use of private property or associated property rights to any person or entity other than a public agency or a regulated public utility;**
- (ii) transfer of ownership, occupancy or use of private property or associated property rights to a public agency for the consumption of natural resources or for the same or a substantially similar use as that made by the private owner; or**
- (iii) regulation of the ownership, occupancy or use of privately owned real property or**

associated property rights in order to transfer an economic benefit to one or more private persons at the expense of the property owner.”¹⁶

The noun-phrase “private use” is transformed into the action verbs of transferring or regulating. But it is not this grammatical peculiarity alone by which the citizen reader would be surprised; he or she would likely be equally surprised that “private use” means any government regulation of property that gives any private person an economic benefit at the expense of the property’s owner, no matter how small or how temporary the benefit might be. This definition is particularly surprising in view of the stated goal of preventing *Kelo*-like transfer of a homeowner’s entire property interest to a private developer.

Subparagraph (iii) of the proposed amendment is the most far-reaching, as it bans any laws or ordinances that regulate ownership, property, or use of property. For once, the initiative provides no definitions of important terms:

- “Use” is not defined. Although the proponents claim “Nothing in this proposed ballot measure would prohibit or limit legitimate land use decisions, zoning, work place laws, or environmental protections,”¹⁷ there is no such prohibition in the text of the measure itself.
- “Associated property rights” are not defined. It will be left to courts to determine what this phrase means, and its extent.
- The phrase “in order to transfer an economic benefit” is possibly a qualifying phrase, but again it is undefined, so its meaning is open to differing interpretations.
- “Economic benefit” itself is undefined.

The phrase “economic benefit” creates the most uncertainty. What is an “economic benefit”? It might be argued that the phrase is somewhat narrow, and would apply only when the transfer is part of a direct monetary transaction.

A dictionary definition of “economic” is “of or relating to the production, development, and management of material wealth.” “Wealth” in turn is defined as “all goods and resources having value in terms of exchange or use.” It is unclear if “economic” limits or modifies “benefit” in any significant way.

The California Supreme Court would be the ultimate arbiter of the language of the initiative. Recently, in *Hernandez v. City of Hanford* (2007) 41 Cal.4th 279, that court took an expansive view of economic activity. Such a court, with a broad reading of “economic,” could reasonably find that any regulation that transfers the use or use-value of property from one private person to another would be unconstitutional under the initiative, as it would constitute an “economic benefit.”

5. Invalidation of Tenant Notice Periods

Numerous state statutes provide certainty to landlord-tenant relations and ensure that transactions are not one-sided. Among these are notice provisions. Rent increases (and all other changes in a leasing agreement) must be preceded by 30 days’ notice (60 days for a rent increase of more than

¹⁶ Proposed Cal. Const. art. I, section 19(b)(3).

¹⁷ Californians for Property Rights Protection, *FACT SHEET: The California Property Owners & Farmland Protection Act. California Constitutional Amendment*, http://www.yesonpropertyrights.com/fs/global:file/publish/publish_jkb2iv10czgg5ew_files/file/id/jkf01aokyc697.

ten percent).¹⁸ Landlords terminating a Section 8 federal rental voucher contact must give 90 days' notice.¹⁹

Terminating a tenancy when the tenant is not at fault is governed by various requirements. Mobilehome tenants, and other tenants in place for one year, must be given 60 days' notice to vacate.²⁰ Residential tenants in place for less than one year must be given 30 days' notice.²¹ In addition to these general rules, numerous other provisions pertain to special situations. Tenants in a building undergoing a condominium conversion are generally given 180 days' notice or 90 days' notice.²² Tenants in buildings being removed from the rental market pursuant to the Ellis Act (see above) must be given 120 days' notice; if they are senior or disabled, the notice is extended to one year.²³ If a mobilehome park is to be converted to another use, the residents must receive 12 months' notice, if the change of use requires no permits.²⁴

Commercial tenants must be given 30 days' notice, but the parties may agree to reduce the notice time to 7 days.²⁵

All of these provisions are in recognition of the fact that a change or termination of a private person's property rights to occupy real property, as their dwelling or to further their livelihood, is a drastic event and adequate time should be provided to adjust and/or make other arrangements. For example, the one-year notice for seniors or tenants with disabilities was enacted due to the extreme difficulty such individuals face in locating alternate affordable, accessible dwellings. But because these statutes transfer an economic benefit (i.e., continued use of the property) from one private party to another, they would likely be found unconstitutional, if the initiative passes.

With all of these statutes invalidated, a notice period would only be subject to agreement of the parties, as is partially done currently with commercial tenancies, which allow the parties to contract for a notice period of between 7 and 30 days (Civil Code Section 1946). But even the limited regulation of commercial notices, requiring a notice period within a specified range set by statute, would likely be ruled invalid.

6. Invalidation of Protections Regarding Terminations of Tenancies

In general, a property owner has the right to use and occupy his or her own property, in the absence of a statutory provision to the contrary. For centuries, however, there has always been one important exception to this general rule: a landlord does not have the right to use and occupy property that he or she has leased to someone else. For the duration of the lease, the tenant enjoys an exclusive right to use and occupy the property, and this right is superior to that of all others, including the landlord. It is only when the leasehold ends that the landlord can displace the tenant and again enjoy the full right to use and occupy the property. Until then, the tenant has the present possessory interest in the property, and the landlord has a right of "reversion," i.e., the property reverts to the landlord when the tenancy ends.²⁶

Therefore, how and when a leasehold may be terminated is critically important to landlords and tenants alike. Under state law, a tenancy may be terminated for cause (usually the tenant's failure

¹⁸ Civil Code Section 827.

¹⁹ Civil Code Section 1954.535.

²⁰ Civil Code Sections 798.55, 1946.1.

²¹ Civil Code Section 1946.1.

²² Government Code Sections 66427.1 and 66459.

²³ Government Code Section 7060.4.

²⁴ Civil Code Section 798.56(g)(2).

²⁵ Civil Code Section 1946.

²⁶ See Civil Code Section 768.

to pay rent or violation of a lease provision), or for no cause, by simply giving the tenant notice of an intent to terminate. (A fixed-term lease requires no notice to terminate.)

The state Mobilehome Residency Law²⁷ (MRL) and many California cities regulate the grounds on which a tenant may be evicted. The MRL and local ordinances allow both for-cause evictions (e.g., failure to pay rent) and some no-fault evictions, such as the eviction of a tenant in order for the landlord to occupy, or to convert to another use.

The "just cause" eviction provision in the MRL was enacted in acknowledgment of the extreme difficulty in moving a "mobile" home after a termination, which costs thousands of dollars. In addition, for both mobilehome park residents and other tenants, there is often no place to move to—there is a chronic shortage of rental housing and mobilehome park spaces throughout California. Limiting displacements to those for just causes imposes a small but real burden on the landlord, but confers an enormous (economic) benefit on the tenant. Both the state legislature and local governments (often by local vote) have implemented just cause protections as important public policies. The initiative would very likely do away with these protections.

This conclusion relies on an interpretation of the word "transfer" that is not apparent at first glance from the plain meaning of the word. But it is plausible that courts would accept and apply a broad interpretation of "transfer." In view of the broad-ranging and novel definitions assigned to several words in the proposed amendments, it appears clear that the amendments are intended to be interpreted as broadly as possible to limit government regulation of private property. Within this generally broad language proposed for the amendment as a whole, the word "taken" is allowed extra scope for a broad interpretation. Although other words are assigned broad and novel meanings, those words are defined with specific meanings. In contrast, the word "taken" is not assigned any specific meaning, but instead has its meaning suggested by a few illustrative examples. For example, the proposed amendment says that "'private use' means . . ." As to the word "taken," the proposed amendment says only that its definition "includes" the sorts of things that are provided by way of example. Thus, there is no clear limitation on what the word "taken" is intended to mean.

The second reason that just-cause eviction laws likely would be invalidated is that they would constitute a prohibited "private use." Again, under the initiative a "private use" means *regulation* of the occupancy of private property in order to transfer an economic benefit to a private person at the expense of the property owner. Just-cause eviction laws are indisputably a regulation of the occupancy of private property, and they are likely to be interpreted as existing in order to transfer an economic benefit from the landlord to the tenant. This is so for two reasons. First, in today's economy, in which many aspects of economic life, including employment and the right to public benefits, require a person to have a fixed address, the continued right to occupy property is an economic benefit. Second, in many cases, just-cause eviction laws were enacted as part of rent-control laws. And in all of those cases, the just-cause law was enacted explicitly to confer a defined economic benefit—the right to occupy property at a fixed rent—on the tenant, and to do so at the landlord's expense.

Further, these "just cause" provisions, by their very nature, transfer an economic benefit to the private-party tenant: the present right to use and occupy the property. "Just cause" regulations directly interfere with a landlord's right of reversion in the property. (However, they do protect landlords' right to recover possession in appropriate cases, such as a tenant's failure to comply with the lease or a landlord's desire to move into rental unit himself or herself.)

Even without an explicit repeal of just cause protections, the initiative would have the practical effect of rendering them useless. A landlord seeking to remove a tenant would simply raise the rent to some astronomical level—clearly permitted under the initiative—and regain possession after the

²⁷ Civil Code Section 798 and following.

tenant moves because he or she can no longer afford the rent. Although Civil Code Section 1942.5 prohibits retaliation against a tenant for asserting a legal right, including large rent increases, that portion of the section would be rendered unconstitutional as a limitation of a landlord's absolute ability under the constitutional amendment to charge whatever rent he or she wishes.

Other current protections designed to prevent a landlord from forcing out a tenant, such as the prohibition against a landlord cutting off utility services, or blocking access to a dwelling,²⁸ might withstand a challenge under the initiative, but landlords would not need to resort to those tactics—they could simply increase the rent.

Mitigation Measures: In order to mitigate the effects of displacement, local governments often impose various regulations. This is perhaps most often used in the case of a condominium conversion. These provisions, enacted in conjunction with the Subdivision Map Act,²⁹ typically require a landlord to pay relocation assistance to a displaced tenant. In some cases, non-purchasing tenants must be offered extended or lifetime leases, and/or be provided with financial assistance to purchase their dwelling unit. State law also requires to owner to offer tenants an option to purchase the dwelling unit (i.e., a right of first refusal).³⁰

More than 200 California cities and counties have enacted conversion ordinances. Each of these mitigating measures would very likely be made unconstitutional by the proposed amendments to Article 1, Section 19. As already seen, the lease requirements would be invalid because all rent limitations would be declared an unconstitutional taking by the amendment's plain language. Also, the option to purchase is clearly a property right that would otherwise have value (options are commonly bought and sold), and is of economic benefit to the tenant. Finally, local government relocation payment requirements would also regulate the use or occupancy of the landlord's privately-owned real estate in order to transfer an economic benefit to the tenant, because they condition the landlord's right to evict based on making the required payment.

In addition, the Ellis Act (see above) allows cities and counties to require that the landlord offer some financial help to cover moving expenses and the likely higher costs of new accommodations.³¹ Under the initiative, these local mitigating regulations would also be invalid.

Thus, state and local laws intended to mitigate the hardships that result from no-fault evictions would be invalidated.

7. Invalidation of a variety of state laws governing the use and occupancy of residential rental property.

Like just-cause eviction laws, many state laws regulate how and when a landlord may recover rental property from a tenant. Most of these laws are commonsense rules intended to balance the property rights of renters and landlords. Some of these laws have the more basic function of preventing the possibility of violence and ensuring public peace.

Among the latter is California Code of Civil Procedure Section 1016, which requires landlords to use a court process to evict tenants, rather than resort to such forms of self help as driving tenants away by shutting off utilities or changing locks, or attempting to physically eject a tenant through force. This law applies even when a landlord wishes to evict a tenant for failing to pay rent.

Because the court process takes some time, in the case of a nonpaying tenant, the law necessarily

²⁸ Civil Code Section 789.3.

²⁹ Government Code Section 66473 and following.

³⁰ Government Code Sections 66427.5 and 66459.

³¹ Government Code Section 7060.4.

requires a landlord to suffer a tenant's remaining on the property rent-free while the process runs its course. Thus, as with just-cause eviction laws, Section 1016 temporarily transfers to the tenant a right to occupy the landlord's property that, absent that law, the tenant would not have. As a result, the statute confers an economic benefit—continued occupancy of the rental unit—at the landlord's expense. Because this would violate the proposed amendment to the state constitution, the law requiring it would be unconstitutional, and so invalid.

At first blush, invalidation of a law that delays a landlord's ability to evict a nonpaying tenant might not seem troubling to some people. But it becomes troubling when two things are considered. First, the law provides a court process not only to a so-called deadbeat tenant who has failed to pay rent and wishes to take advantage of every opportunity for delay to prolong his or her period of living rent-free, but also those tenants who really have paid their rent and are being evicted in bad faith. For those tenants, the law provides the only chance to allow an impartial court to hear the truth and prevent an unjust eviction. Tenants too should not have their property taken from them without due process of law. Second, the same logic that would invalidate laws against landlord self-help would also invalidate laws requiring that tenants be given fair notice before their tenancies are terminated³² or that restrict a landlord's right to enter the rental premises during the lease term.³³ These laws also "transfer" an occupancy right to the tenant that might otherwise belong to the landlord, and by doing so confer on the tenant an economic benefit at the landlord's expense.

Whatever the merits of limiting government's right to seize a person's home and transfer it to a developer as the city government did in *Kelo*, it is difficult to see how invalidating long-standing laws regarding rights of tenants would advance that goal. For, far from resulting in the seizure of private property, these laws merely balance two competing sets of rights that the laws of English-speaking nations have recognized for centuries: the possessory rights of tenants, and the reversionary ownership rights of landlords. The proposed constitutional amendment would upset this traditional balance, and would do so based on an eminent domain case having nothing at all to do with landlords or tenants.

Changes to Housing Laws That Are Reasonably Possible

A person believing that a state or local law contravenes the Constitution must sue to challenge its validity. The courts would then ultimately decide if the law is unconstitutional and therefore invalid. As the proposed constitutional amendment is broadly drafted, with some novel definitions, and with other terms not defined at all, it is impossible to say with certainty what all of the effects of the amendment might be. There is likely to be a flood of litigation to fill in the details of the initiative.

As noted above, the prohibition against "regulation of the ownership, occupancy or use of privately owned real property" is very broad and undefined. "Regulation" could reasonably be interpreted to mean any law. "Regulation" has been defined as "a principle, rule, or law designed to control or govern conduct." Laws regulate by their very nature.

But the initiative goes even further. It not only prohibits regulation of ownership, occupancy, and use, but also any "associated property rights."³⁴ Again, the term is undefined, but it is reasonable to assume it was inserted to make the prohibition as broad as possible. Any nuances about the phraseology of the subparagraph should, it seems, be construed against a regulation.

³² Code of Civil Procedure Sections 1161 and 1161a.

³³ Civil Code Section 1954.

³⁴ Proposed Cal. Const. art. I, section 19(b)(3)(iii).

Also, as noted above, the possible qualification that the regulation is enacted "in order to transfer an economic benefit to one or more private persons at the expense of the property owner" is again undefined, including the all-important question of what an "economic benefit" might be. It is reasonable to assume that any regulation of the arms-length transactions of property buyers, sellers, landlords, and tenants all transfer economic benefits. The offer and acceptance to forgo a right or responsibility imposed by law can always be assigned an economic value.

Furthermore, when arguing against rental housing legislation in the state Legislature, landlord groups often assert that new legislation will decrease rental property values. What is an economic detriment to one could easily be interpreted as an economic benefit to another.

Other regulations have a dual nature to them. For example, Civil Code Section 814.4 prohibits "spite fences" over 10 feet in height. The statute authorizes suit for injury when the adjoining property owner is injured "in his comfort or the enjoyment of his estate." By regulating an owner's use of his property (to construct a 15-foot fence if he or she so chooses), the statute at first glance may survive challenge, as "comfort" or "enjoyment" might not be considered economic benefits. But the adjoining owner may suffer an economic loss also—his property value is likely decreased by the presence of the fence. In this case, the statute may be read to transfer both economic and non-economic benefits. There is no direction in the initiative as to how to rule in such a case. If anything, the absence of qualifiers such as "*primarily* in order to transfer an economic benefit," or "*solely* in order to transfer an economic benefit," would lend support that any amount of economic benefit transfer would render the statute impermissible.

Below are some examples of existing laws that might reasonably be ruled unconstitutional by the courts.

8. Restriction of Foreclosure Protections and Procedures

In the first 3 quarters of 2007, more than 170,000 California properties received Notices of Default (the first step in the foreclosure process), and more than 52,000 were foreclosed upon.³⁵ These numbers are not expected to decrease anytime soon.

California law provides a variety of protections for homeowners facing foreclosure, including notices, a reinstatement period, and a redemption period.

Undefined terms in the initiative, in addition to those discussed above, leave open to question whether all the existing statutory and common law protections for homeowners would be valid. This is because the initiative does not completely define the term "property owner."

Owning property is not absolute. It is more precise to speak in terms of "interests" in property, each of which consists of a bundle of rights the "owner" may assert against others.³⁶ As noted above, a tenant is an owner of property—he or she holds the present possessory interest in the property, to the exclusion of all others, including the landlord. A property may be subject to CCRs (conditions, covenants, and restrictions) where interests in property, down to such details as exterior paint color, are "owned" by the community to the detriment of the person one might normally assume to be the owner.

The initiative deals with differing owners only partially, in proposed Section 19(b)(7):

"Owner' includes a lessee whose property rights are taken or damaged."

³⁵ DataQuick Information Systems, <http://www.dataquick.com>.

³⁶ *Powell on Real Property*, Section 1.05.

Thus, a tenant is recognized as an owner by the initiative, but only to the extent that his or her property rights are abridged. But the initiative does not speak to owners or holders of other types of property rights.

In California, the most common method of securing a real property loan is the deed of trust. On its face, a deed of trust conveys ownership of the property from the borrower (trustor) to a trustee (typically a title insurer), with the lender as beneficiary. The words of the most common form trust deed in California read:

"Borrower irrevocably grants and conveys to Trustee, in trust , with power of sale, the following described property . . ."³⁷

On the surface, then, the trustee is the "owner" of the property. This view was endorsed, albeit reluctantly, by the California Supreme Court in *Bank of Italy v. Bentley*, (1933) 177 Cal. 644, 655:

"In the early case of Koch v. Briggs, 14 Cal. 256, it was held that mortgages and deeds of trust were fundamentally different in that in a mortgage only a "lien" was created, while in a deed of trust "title" actually passed to the trustee. This distinction, although frequently attacked by counsel and often criticised [sic] by the courts, has become well settled in our law and cannot now be disturbed. [Citations.]"

As such, because the home is of such importance, statutory and case law protections for borrowers in default serve to slow the lender-owner's ability to reclaim possession of their property. A borrower is accorded enormous economic benefits under current law: he or she can remain in possession for up to 1 year or more without paying anything to the lender-owner.³⁸

Again, owing to the primacy of homeownership, the borrower also has multiple opportunities to recover the property. Up until 5 days before the date of the sale, the borrower can be re-instated to the original loan terms by paying the arrearages plus costs, despite any acceleration clause in the contract.³⁹ In a non-judicial, private foreclosure, the borrower may redeem by paying the whole amount due any time before the sale.⁴⁰ In a judicial foreclosure, the borrower may redeem for 3 months or 1 year *after* the sale, depending on the amount of the sale proceeds.⁴¹

The court in *Rainer Mortgage v. Silverwood* (1985), 163 Cal.App.3d 359, recognized that the ability of a borrower to redeem the property after sale inherently depresses the sale price. Thus, economic benefit is again transferred by regulation.

The courts have noted that, although title is held by the trustee, the borrower retains many rights of ownership. In *MacLeod v. Moran* (1908) 153 Cal. 97, 100, the state Supreme Court summarized:

"The nature of such an instrument has been extensively discussed by this court, and the sum and substance of such discussion is that while the legal titles passes thereunder, and the trustees cannot be held to hold a mere 'lien' on the property, it is practically and substantially only a mortgage with power of sale."

The court also said, recognizing that there can be different owners with different property interests, that the trustee had the "right to convey upon default on the part of the debtor in the payment of his debt" (at 100-101), while the borrower retained other incidents of ownership.

³⁷ California Single Family Fannie Mae/Freddie Mac Uniform Instrument.

³⁸ Civil Code Sections 2924c, 2924f; Code of Civil Procedure Sections 729.010-729.090.

³⁹ Civil Code Section 2924c.

⁴⁰ Civil Code Section 2905.

⁴¹ Code of Civil Procedure Section 729.030.

The argument could be made that a trustee is not an "owner" of the property for purposes of the initiative. Yet the lack of a useful definition of "owner" in the proposed language, failing to distinguish between holders of various interests in property, leaves the issue open to doubt. The fact that the other "private person" also owns interests in the property could easily be ruled irrelevant; the initiative does not exempt them in any manner. While a court could "legislate" and insert such an exemption into the otherwise silent initiative, they could just as easily decline to do so.

What would be the effect? Borrowers and lenders would be free to negotiate the procedures and protections afforded in case of default. At common law, lenders could invoke "strict foreclosure" and remove the delinquent borrower by any means provided for in the contract. Strict foreclosure has been banned in California for over a century (Civil Code Section 2889). This section could also be held unconstitutional under the initiative. If so, the law could simply revert to the strict foreclosure process, where the lender is "entitled to immediate possession of the land, and may enter peaceably, or bring ejectment; and his right to possession cannot be defeated . . ."⁴²

A court could also rule that the trustee's interest in the property is "practically and substantially" with only a lien against the property⁴³ and give no effect to the actual wording of a trust deed. But it could just as well rule that the *MacLeod* line of cases that so hold are *themselves* examples of transferring an economic benefit from the property owner to a private party, by making such an interpretation against the clear intent (at least on paper) of the parties.

Although such interpretations are by no means certain, they are certainly possible and reasoned arguments can be made for such results. The uncertainties that would be introduced into to foreclosure landscape, coupled with the already roiled and dire situation, cannot be said to be sound public policy.

9. Invalidation of Fair Housing Laws

Some fair housing laws would not be affected by the proposed amendments because they are federal laws and therefore preempt any contrary state law. Thus, no matter what the state Constitution may say, a landlord may not refuse to rent to a prospective tenant, nor may a seller refuse to sell to a prospective buyer, because of his or her race or sex, or because he or she has a disability that requires the assistance of a service animal.

But state and local California laws prohibit housing discrimination on bases that federal law does not recognize. For example, state and local laws prohibit discrimination in housing on the basis of sexual orientation.

While it is possible that courts considering a claim of discrimination would consider the claim without regard to traditional property rights, it is not altogether clear that they would do so. If the courts were to consider a discrimination claim in the context of those rights, it is at least arguable that the claim would have to fail on the grounds that it was barred by the proposed amendment to the state constitution. By requiring an owner to sell or rent to a person protected under these statutes to the same extent that the owner would sell or rent to any other person, it could be found that anti-discrimination laws effectively "transfer" the use or occupancy from the owner who wishes to discriminate to the person who would be discriminated against, but who must now be allowed to buy or rent the unit. As discussed above, since so much economic life is available only to persons with a fixed address, the right to live at a fixed address is necessarily an economic benefit. By requiring the owner who may wish to discriminate to sell or rent to a gay person, for example,

⁴² *McMillan v. Richards* (1858), 9 Cal. 365, 407.

⁴³ See Code of Civil Procedure Section 744.

the law would require the landlord to transfer that economic benefit to the tenant at the owner's expense—the expense of his or her right to sell or rent to whomever he or she chooses.

10. Deregulation of Rental Housing

The principal body of state statutory regulation of rental housing is the chapter in the Civil Code entitled "Hiring of Real Property".⁴⁴ It is reasonable to assume that a chapter with such a title does, in the words of the initiative, "regulate the ownership, occupancy, and use of real property," and that some of its provisions confer an economic benefit on others. Here are some examples of such regulation that transfer an economic benefit that were not previously noted above, that a court could reasonably rule as invalid under the initiative.

Landlords must disclose to prospective tenants if the landlord has applied for a demolition permit.⁴⁵ This requirement obviously lowers the value of the rental. Landlords are required to install deadbolt locks in rental units at the landlord's expense.⁴⁶ A usable telephone jack and working wiring is also required, again paid for by the landlord.⁴⁷ Landlords are prohibited from demanding or collecting rent while substandard conditions exist.⁴⁸ There are detailed requirements regarding residential security deposits,⁴⁹ and Civil Code Section 1950.6 imposes procedures and a price limit on renter screening and credit check fees. Sections 1950.7 and 1950.8 impose similar requirements on commercial security deposits. Finally, a contractual waiver of these requirements and others is prohibited.⁵⁰

In addition to these statutory provisions, there are case law regulations that landlords and tenants must abide by. The landlord must provide a habitable dwelling (*Green v. Superior Court*, (1974), 10 Cal.3d 616) and maintain habitability at his or her expense, for the benefit of the tenant.

As noted above, an economic benefit can be any benefit has value in terms of exchange or use. All of the statutes noted transfer either an exchange benefit or a use benefit from the landlord to the tenant, and are intended to do so. Rather than impose these provisions by law, the initiative could reasonably be interpreted to do away with them, leaving landlords and tenants free to negotiate these terms.

11. Deregulation of Real Estate Sales

For most California families, a home is far and away the most important and costly purchase they will ever make. The Legislature has enacted a comprehensive scheme of regulation designed to protect residential real property purchasers. These statutes affect the "ownership" of property, and certainly affect the "associated right" to sell or alienate the property. These modern-day restraints on alienation transfer an economic benefit to buyers, who would otherwise have to bargain with the seller for specific acts or disclosures.

Civil Code Section 1102 and following requires various disclosures by a seller of residential real property. The disclosures must be made in a particular form.⁵¹ A city or county may impose its own

⁴⁴ Civil Code Division 3, Part 4, Title 5, Chapter 2; Section 1940 and following.

⁴⁵ Civil Code Section 1940.6.

⁴⁶ Civil Code Section 1941.3.

⁴⁷ Civil Code Section 1941.4.

⁴⁸ Civil Code Section 1942.4.

⁴⁹ Civil Code Section 1950.5.

⁵⁰ Civil Code Section 1953.

⁵¹ Civil Code Section 1102.6.

additional mandatory disclosures on a mandatory form.⁵² Further disclosures are required regarding possible flooding, substantial forest fire risk, earthquakes, landslides, possible liquefaction of the soil, and the presence of an airport. Property taxes and Mello-Roos special assessments must also be disclosed.⁵³ If the property is in close proximity to a site that might contain live ammunition (e.g., from a former military base), that too must be disclosed.⁵⁴

It is obvious that the circumstances that require mandatory disclosure will affect the value of the property, to one degree or another. As such, it is reasonable to say that these mandatory disclosure requirements transfer an economic benefit from one private party to another. They would therefore be rendered invalid under the initiative.

In addition to state laws, local condominium conversion ordinances often require the owner to make modifications or perform other acts before sales may occur. Examples of what may be required or increased include: off-street parking; sound insulation; open space; termite inspections and mitigation; seismic retrofitting; and initial capitalization of the new homeowners' association. Industry advocates have argued that these requirements in many cases preclude a conversion. Do they provide an economic benefit to buyers? Again, it is reasonable to say that they do, and that in fact it is the *raison d'être* for the ordinances.

12. Invalidation of the Mobilehome Residency Law

The Mobilehome Residency Law (MRL)⁵⁵ is in essence a comprehensive scheme to regulate the ownership, occupancy and use of real property and associated property rights. That being so, the MRL is on its face in conflict with the proposed initiative. The only question is whether the provisions confer an economic benefit on another private party.

In a multitude of instances, the MRL is intended and does just that: It requires a written rental agreement and specifies many of the terms that must be included⁵⁶; Allows the prospective resident to cancel the agreement within 72 hours⁵⁷; Specifies the duration of agreements which must be offered⁵⁸; Prohibits waivers of rights⁵⁹; Prohibits the park owner from requiring a right of first refusal should the home be offered for sale⁶⁰; Requires park owners to approve subletting⁶¹; Requires specified procedures for amending park rules and regulations⁶²; Requires 90 days' notice of a rent increase⁶³; Regulates security deposits⁶⁴; Limits the price that a park owner may charge for liquefied petroleum gas⁶⁵; Regulates termination procedures⁶⁶; Requires just cause for termination⁶⁷; Requires homes sold to remain in a park under certain conditions⁶⁸; Regulates park owner's

⁵² Civil Code Section 1102.6a.

⁵³ Civil Code Sections 1102.6b and 1102.6c.

⁵⁴ Civil Code Section 1102.15.

⁵⁵ Civil Code Section 798 and following.

⁵⁶ Civil Code Section 798.15.

⁵⁷ Civil Code Section 798.17.

⁵⁸ Civil Code Section 798.18.

⁵⁹ Civil Code Section 798.19.

⁶⁰ Civil Code Section 798.19.5.

⁶¹ Civil Code Section 798.23.5.

⁶² Civil Code Section 798.25.

⁶³ Civil Code Section 798.30.

⁶⁴ Civil Code Section 798.39.

⁶⁵ Civil Code Section 798.44.

⁶⁶ Civil Code Section 798.55.

⁶⁷ Civil Code Section 798.56, also see section above on terminations.

⁶⁸ Civil Code Section 798.73.

approval of a new purchaser of a home⁶⁹; Requires specified disclosure forms for prospective park tenants⁷⁰; and Permits reasonable attorney fees to enforce the MRL.⁷¹

In fact, there are very few sections in the MRL that do not convey an economic benefit. For example, Section 798.70 regulates the placement of for sale or rent signs by the tenant. But even that could be seen as an economic benefit in that the owner could charge a fee for placing the signs. If a court were to rule in that fashion, virtually the entire MRL would be unconstitutional.

It is possible that only those sections of the MRL that define terms (Sections 798.2 through 798.12) would withstand challenge. But with the rest of the MRL rendered unconstitutional, the definitions would exist in a vacuum.

13. Deregulation of Property Law

The initiative's very broad language calls into question every regulation of property law.

Civil Code Division 2, Chapter 2 (section 755 and following) is entitled "Real or Immovable Property" and sets forth a comprehensive scheme of real property regulation. While some of the sections are definitions, and thus do not per se transfer an economic benefit, others do.

For example, the Legislature abolished the common-law "fee tail estate" in the 19th century. This provision prevents a property owner from keeping property in his or her family by restraining the descendants' ability to sell the land outright. By outlawing their use, the state in effect transfers an economic benefit (the right to transfer with conditions) to another private person.

The example may be far-fetched and it is doubtful that the proponents intended such a result. But that is not what was written in the initiative. A court following the letter of the Constitution would be bound to reach the result that all attempts to regulate the ownership, occupancy or use of property, or associated property rights, must be unconstitutional.

Regulation of the "ownership" of real property and associated rights could call into question even more basic principles. There is no magic formula to the recognized forms of property ownership such as joint tenancy, tenancy-in-common, and community property. At a minimum, many issues will be litigated, especially in dissolution of marriage proceedings, to determine the scope of the initiative.

14. The Alternative: Buyer Beware & Absolute Freedom of Contract

One might assert that all of these changes would lead to chaos and thus could not possibly be the intent of the initiative, and courts would never rule in some of the ways suggested. Leaving intent aside, it is theoretically possible, with perhaps only a bit of chaos in the beginning, to replace the regulatory provisions of state statutes and centuries of common-law and equity decisions with real property transactions based entirely upon contract. Buyers, sellers, landlords, and tenants could freely enter into agreements regarding real property, and the agreement would serve to establish all rights and responsibilities. Courts would be called upon to adjudicate disputes regarding the contract terms, as they do now in all sorts of other contractual matters.

⁶⁹ Civil Code Section 798.74.

⁷⁰ Civil Code Sections 798.74.5, 798.75, 798.75.5.

⁷¹ Civil Code Section 798.85.

Rather than rule that failure to disclose to a prospective tenant that the building will be demolished (see above) violates a statute, the case would turn on the contract law question of whether there was such a requirement in the contract, or whether there was failure to disclose a material fact.

Rather than subject a lender-owner with a defaulting borrower to a long and costly foreclosure process, the contract (and therefore the law) could simply permit strict foreclosures. Reinstatement and redemption provisions could be the subject of negotiation between the parties.

Rather than lengthy notices and just cause protections, mobilehome owners fearful of having to move their mobilehomes at the behest of the landlord could negotiate long-term leases.

What is lost in these scenarios, which courts have recognized for a very long time, is that the parties often have unequal bargaining power. The whole of property regulation can be seen in the same light, as an attempt to insert some equity into the process, just as courts of equity have attempted to soften the harshness of the rules of common law. The initiative, as drafted, would in some cases return California to notions of property law that are very well-established, and could undo centuries of American and English property law.

As the *McMillan* court noted (at 407-408), the rule to treat property transfers merely as a lien, despite the clear language of the deed, was "established to prevent the hardships springing by the rules of law from a failure in the strict performance of the conditions attached to the conveyance . . ." The courts intervened on behalf of borrowers, in the interests of the courts' notion of equity. The initiative, since it modifies the state Constitution, would preclude a court from so doing. The notion of equity mandated by the initiative would be that of freedom of contract—the right of persons to enter into agreements as they see fit and are able, regardless of the relative bargaining power of the parties.

Buyers of property may have more bargaining power than tenants at a particular time, but that it not always true. Over and over, the state and local governments have made policy decisions in favor of consumer protections. Under the initiative, it is plausible and reasonable to deduce that a more absolute form of the doctrine of *caveat emptor* would return to real estate transactions. It can be argued that chaos would not result. Instead, savvy buyers would insist (and pay for) desired terms. For example, under current law, termite inspections are not required, yet they are ubiquitous. The unsophisticated and those who, for a variety of reasons, have unequal bargaining power would be adversely affected by the initiative. Middle class and poor families would be disparately affected, as they typically do not have the means the engage attorneys to review home purchase contracts or lease agreements.

It should be noted again that the more drastic results (possibly unintended) set forth in this section are not at all certain to occur should the initiative pass. They are however, outcomes that can reasonably be expected given the language chosen, either by design or accident, in the initiative.

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December 6, 2007

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1212 Broadway, Suite 630
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**Re: Howard Jarvis Ballot Initiative, "California Property Owners and
Farmland Protection Act"**

Dear Ms. Smartt:

You have asked us to review the ballot initiative drafted by the Howard Jarvis Taxpayers Association entitled the "California Property Owners and Farmland Protection Act" ("Initiative"), which will almost certainly appear on the ballot in the California primary election on June 3, 2008. A copy of the Initiative as submitted to the Attorney General is attached as Exhibit A. This updated letter outlines some of the Initiative's potential impacts on the ability of state and local governments in California to protect the environment and ensure the safe and orderly development of their communities. This letter does not address the Initiative's potential impacts on urban redevelopment, rent control, or regulatory programs outside the fields of environmental and land use law.

For over 25 years, Shute, Mihaly & Weinberger LLP's practice has focused on land use and environmental law in California. The firm has developed a special expertise in defending public agencies against regulatory takings and other challenges to their authority to adopt regulations enacted for the public's health, safety, and welfare. Attached hereto as Exhibit B is a list of published judicial opinions in cases involving regulatory takings and other constitutional challenges to regulation in which the firm has been lead counsel or appeared on behalf of amici curiae.

EXECUTIVE SUMMARY

Since at least the early twentieth century, the government's power to regulate the use of property for public health, safety, and welfare has been generally accepted, and the courts accordingly have afforded the legislative and executive branches of government the flexibility necessary to respond to the social and economic problems of an increasingly complex society. Nevertheless, on rare occasions, the courts have invoked the Just Compensation Clauses of the federal and state constitutions to restrain regulation that the judiciary deemed excessive. The Just Compensation Clauses provide that the government shall not "take" private property for a public use without payment of just compensation. While the Clauses were originally intended to apply only to government's direct condemnation of property, courts have also allowed compensation in the rare case where government-imposed regulation severely diminishes the value of the regulated property. See *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 414-15 (1922).

Beginning in the early 1980's, a well-organized property rights movement has sought to curtail government's regulatory authority. In particular, this movement has advanced an expansive interpretation of the Just Compensation Clauses in lawsuits challenging regulations that seek to create livable communities and to protect the environment. The United States Supreme Court has recently rejected this aggressive interpretation of the federal Just Compensation Clause in a series of decisions. Most recently, in *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 537-39 (2005), the Supreme Court reaffirmed that taxpayers are not required to compensate private property owners unless a regulation is the "functional equivalent" of eminent domain, i.e., the impact of the regulation on the property is so extreme that it destroys all use or value in the property.

Having been unsuccessful in litigation, the property rights movement has shifted its focus to the legislative realm. Its followers have sponsored voter initiatives seeking to amend the Just Compensation Clauses in a number of state constitutions to require that public agencies compensate property owners whenever those agencies adopt or apply a broad array of regulations. Given that government will be unable to pay to regulate, these measures are actually aimed at halting the enactment or enforcement of public health, safety, and welfare regulation. Most of these "regulatory takings" measures have been designed to capitalize on the public furor in the wake of the United States Supreme Court's 2005 decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), which upheld the use of eminent domain for urban redevelopment. In November 2006, voter initiatives on the ballots in several states joined eminent domain reform with restrictions on government's power to regulate for the public's health, safety, and welfare. In California, the voters narrowly rejected one such measure, Proposition 90.

The Initiative was developed in response to the failure of Proposition 90. Like Proposition 90, it would repudiate the Supreme Court's holding in *Kelo* by prohibiting the use of eminent domain for urban redevelopment and would expressly invalidate rent control ordinances throughout the state. It would also amend the California Constitution to add a regulatory takings provision that would allow a property owner to sue to obtain compensation for, and/or to invalidate, regulation that imposes costs on the owner, regardless of whether the regulated activity is a nuisance, a threat to public health or safety, or harmful to the environment. The Initiative prohibits regulations affecting the use of real property that are enacted "in order to transfer an economic benefit to one or more private persons at the expense of the property owner." Initiative § 3 (adding Cal. Const. art. I, § 19(b)(3)(iii)).

Put simply, nearly *all* regulation provides an economic benefit to *some* private person. Accordingly, although the Initiative is ambiguous in several significant areas, a court could interpret it to restrict a host of environmental and land use regulations that would be plainly legitimate under existing law, such as:

- Regulation of greenhouse gas emissions under AB 32 and other laws to limit global climate change and protect communities from the dangerous effects of climate change;
- Regulations that protect coastal areas, forestland, farmland, and ranchland, as well as cultural and historic sites;
- "Smart growth" regulations designed to promote compact, walkable, and transit-oriented communities that combine residential and commercial land uses; and
- Ordinary zoning regulations, such as restrictions on the development of polluting industry, adult businesses, and "big box" megastores.

Each of these kinds of regulation is likely to impose costs on regulated entities, such as oil refineries, power plants, and real estate developers, while conferring economic benefits on private parties. For example, clean, non-polluting businesses benefit from climate change regulations and other environmental regulations that raise the costs of business for their higher-polluting competitors. And homeowners clearly benefit from zoning regulations that prevent heavy industry or adult businesses from moving into their neighborhoods.

Beyond its effect on regulation, the Initiative would prohibit eminent domain where the public agency's use of the property is "the same or a substantially similar use as that made by the private owner." Initiative § 3 (adding Cal. Const. art. I, §

19(b)(3)(ii)). Property owners could invoke this provision to thwart the use of eminent domain to protect the environment. Public agencies desiring to use eminent domain to purchase park land or protect open space, resource lands, species habitat, ecosystem services, historic buildings, cultural sites, and other environmental values may be prevented from doing so on the grounds that these uses are essentially the same as the current property owner's use of the particular land or property in question.

Further, the Initiative appears to impair a broader class of environmental regulations than did Proposition 90. Where Proposition 90 exempted health and safety regulations from its compensation requirement, the Initiative contains no such exemption. Proposition 90 also required compensation only for regulation that causes a "substantial economic loss." The Initiative, in contrast, could apply to regulation that imposes even a minor economic burden. Finally, Proposition 90, unlike the Initiative, did not prohibit the use of eminent domain for conservation purposes.

If the Initiative becomes law, it is not clear how it will be interpreted by the courts. There is a substantial risk, however, that it would be broadly construed to prevent the enforcement of many existing environmental regulations as well as the adoption of new laws and policies to protect the environment. This risk, and the types and breadth of environmental programs that could be affected, are analyzed in greater depth below.

LEGAL ANALYSIS

The Initiative could gravely undermine government agencies' use of both eminent domain and traditional regulation to protect the environment and sensibly plan for new real estate development. Section I addresses the potential impact of the Initiative's regulatory takings provision on environmental and land use regulation. Section II then addresses the Initiative's potential restriction of the use of eminent domain to protect open space, species habitat, and other existing environmental values.

I. The Initiative's Potential Impact on Environmental and Land Use Regulation

A. Background on Regulatory Takings

Beginning with Justice Holmes's decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the Supreme Court has acknowledged that regulation may, in extreme cases, have so severe an effect on private property that it becomes the functional equivalent of an exercise of eminent domain and requires the payment of just compensation under the Just Compensation Clause of the Fifth Amendment. Few such "regulatory takings" cases were decided by the Court, and all were decided in favor of the government, until the 1980s and 1990s, when the Rehnquist Court began to expand the reach of the Just Compensation Clause. *See, e.g., Dolan v. City of Tigard*, 512 U.S. 374 (1994)

(public agency has burden to show rough proportionality between permit condition requiring dedication of land and harms anticipated from proposed development); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (regulation effects a taking where it deprives land of all value); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) (recognizing the possibility of temporary regulatory takings); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (regulation requiring permanent physical occupation of any portion of private property is a taking per se) .

Despite the Court's renewed interest in regulatory takings, the impact of its decisions was sharply limited and did not bring about a significant change in the lower courts' approach to challenges to regulation. In a string of recent cases, moreover, the Court has retreated from its prior experimentation with regulatory takings doctrine, reemphasizing that the Just Compensation Clause requires compensation only where regulation virtually wipes out all use or value of a property and signaling that most environmental and other regulation is effectively immune from challenge under the Just Compensation Clause. See, e.g., *Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002) (temporary moratorium necessary to study long term controls to preserve water quality not compensable despite total ban on development for 32 months); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005) ((1) validity of regulation of property that is not arbitrary and does not impose severe economic burden is policy question for legislative branch of government; (2) taking under any test requires finding of severe economic burden). California courts apply federal takings law in construing the state constitution's Just Compensation Clause, Article I, Section 19. See *San Remo Hotel, Inc. v. City & County of San Francisco*, 27 Cal. 4th 643, 664 (2002).

In the face of the courts' reluctance to find regulations to be compensable takings, there have been a variety of attempts at the federal, state, and local levels to adopt a broader takings doctrine through legislation or state constitutional amendment. The most prominent example is Oregon's Measure 37, adopted by the voters in 2004. Measure 37 requires state and local agencies to (1) either rescind all land use regulation that has diminished property values or compensate the owners and (2) compensate owners for the economic impact of future regulation. The Oregon Supreme Court recently rejected a challenge to Measure 37. *MacPherson v. Dep't of Admin. Servs.*, 130 P.3d 308 (Or. 2006). 1000 Friends of Oregon reports that as of March 2006, Oregon's government agencies have been confronted with more than 7,700 claims for a total of \$15 billion in compensation.¹

¹ Due to widespread dissatisfaction with Measure 37, however, the opponents of Measure 37 sponsored Measure 49 on the November 6, 2007 state-wide ballot, which was designed to narrow the scope of Measure 37. Measure 49 prevailed, by a margin of 61 per-

In California, several local regulatory takings measures have failed over the past several years. There was no serious statewide effort to enact a regulatory takings initiative until Proposition 90 qualified for the November 2006 ballot. Proposition 90 was ostensibly designed as a response to the Supreme Court's 2005 decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), which reaffirmed that governments may use eminent domain to foster urban redevelopment. Part of the widespread political reaction to *Kelo*, Proposition 90 included a variety of restrictions on the power of eminent domain. It also included a regulatory takings provision that defined "damage" for purposes of the California Constitution's Just Compensation Clause, Cal. Const. art. I, § 19, as follows:

Except when taken to protect public health and safety, "damage" to private property includes government actions that result in substantial economic loss to private property. Examples of substantial economic loss include, but are not limited to, the downzoning of private property, the elimination of any access to private property, and limitations on the use of private air space. "Government action" shall mean any statute, charter provision, ordinance, resolution, law, rule or regulation.

This language was a dramatic departure from the California Supreme Court's interpretation of Article I, Section 19, converting regulatory takings from the exceptionally narrow category of regulations that amount to the functional equivalent of eminent domain, *see Customer Co. v. City of Sacramento*, 10 Cal. 4th 368, 377 (1995), to the broad class of regulations that result merely in "substantial economic loss." Proposition 90's regulatory takings provision threatened to convert a host of environmental and land use regulations into compensable regulatory takings.

Proposition 90 was defeated in the November 2006 election, but its supporters promised that they would seek to qualify further measures for the ballot. The Jarvis Initiative, entitled the "California Property Owners and Farmland Protection Act," is the heir apparent to Proposition 90.

Like Proposition 90, the Initiative is described by its supporters as eliminating abusive eminent domain practices. Nevertheless, it also contains what is effectively a regulatory takings provision. In several key respects, this provision is broader than that

cent in favor to 39 percent opposed. *See* Eric Mortenson, *Voters keep cigarette tax as is but roll back property rights*, *The Oregonian* (Nov. 7, 2007), available at <<http://www.oregonlive.com/news/oregonian/index.ssf?/base/news/1194418606131680.xml&coll=7>>.

in Proposition 90 and thus could have an even greater impact on the adoption of regulation by state and local governments in California.²

B. The Scope of the Initiative's Regulatory Takings Provision

The Initiative would amend Article I, Section 19 of the California Constitution to restrict the use of eminent domain, including prohibiting its use for redevelopment, and to ban rent control. Beyond those effects, however, the Initiative would prohibit regulation that serves a "private use." The Initiative would add to the current text of Article I, Section 19 the additional proviso that "Private property may not be taken or damaged for *private use*." Initiative § 3 (amending Cal. Const. art. I, § 19) (emphasis added). The Initiative then defines "private use" as including, *inter alia*, "regulation of the ownership, occupancy or use of privately owned real property or associated property rights in order to transfer an economic benefit to one or more private persons at the expense of the property owner." Initiative § 3 (adding Cal. Const. art. I, § 19(b)(3)(iii)). Under the Initiative, an aggrieved property owner may challenge a regulation alleged to be a regulatory taking for private use, and if successful, obtain an injunction invalidating that regulation and/or monetary damages. Initiative § 3 (adding Cal. Const. art. I, § 19(c)).

As discussed below, the regulatory takings provision includes several areas of ambiguity, the interpretation of which will determine the breadth of the Initiative's impact. While a court might read those ambiguous terms to limit the Initiative's impact on regulation, there is a greater risk that the courts will do just the opposite and resolve ambiguities in favor of expanded protection for property owners and against public agencies. Under traditional principles of statutory construction, courts must make every effort to give effect to the intent of legislation. *O'Kane v. Irvine*, 47 Cal. App. 4th 207, 211 (1996). The Initiative's overarching purpose is clearly to expand constitutional protections for owners of private property. At the least, there is a substantial risk that courts will read ambiguous terms in the Initiative so as to limit public agencies' regulatory prerogatives.

The following sections analyze several ambiguous terms in, and questions left open by, the phrase "regulation of the ownership, occupancy or use of privately owned real property or associated property rights in order to transfer an economic benefit to one or more private persons at the expense of the property owner." The meaning that courts give these terms would determine the scope of the regulatory takings provision and the breadth of its impact on state and local environmental and land use regulation.

² The Initiative's regulatory takings provision is not as obviously apparent as the regulatory takings provision in Proposition 90. The Initiative appears to limit regulations that benefit private persons. As discussed below, however, the provision's impact could be more far reaching than it initially appears.

1. “[R]egulation of the ownership, occupancy or use of privately owned real property”

The Initiative does not define “regulation” or “ownership, occupancy or use.” Given their ordinary meaning—the starting place for all statutory and constitutional interpretation, *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 245 (1978)—these terms would give very broad applicability to the regulatory takings provision. In particular, the term “use” could be read to include virtually any regulation that involves activity occurring on “privately owned real property.” It unquestionably includes the broad category of land use regulation, by which state and local governments control the use and development of private property, such as zoning. Even if limited to this meaning of “use,” the Initiative would encompass a wide array of regulations traditionally accepted as valid under existing regulatory takings doctrine.

There is also a substantial risk, however, that a court would apply the provision to other environmental regulation that controls activities occurring *on* real property. For example, a court might refuse to draw a distinction between the regulation of mining on real property (a standard land use regulation) and the regulation of the use of coal on real property (such as an air quality regulation that limits the burning of coal). Accordingly, the Initiative could apply to a variety of pollution control regulations, including greenhouse gas emission regulation; endangered species protection; and any other regulation of activities that occur on “privately owned real property” and thus might be considered “uses” of that land. (Section I.F below provides a list of examples of regulatory fields potentially affected by the Initiative.) The only environmental regulation that can conclusively be said to lay outside the ambit of this provision would be regulation of products or materials not directly used in conjunction with specific real estate, such as regulation of air pollutant emissions from the use of motor vehicles or the use of toxic substances in consumer products.

“Regulation” might also be considered ambiguous. We think the most likely interpretation would include all actions taken by public agencies that control private conduct. See *Black’s Law Dictionary* 1286 (6th ed. 1990) (defining “regulate” as “To fix, establish, or control”). This would include statutes, ordinances, and quasi-legislative rules, but also quasi-adjudicatory decisions, such as a decision to deny a permit, variance, or other necessary government approval. While it might be read somewhat more narrowly to include only legislative acts, such as statutes, ordinances, or rules, such a reading ignores the long history of public agencies’ control of private conduct on a case-by-case, quasi-adjudicatory basis. See, e.g., *Nat’l Petroleum Refiners Ass’n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973) (discussing whether the Federal Trade Commission had power to issue quasi-legislative rules in addition to proceeding by administrative adjudication). A court is unlikely to conclude that rules controlling private conduct are “regulation” while a decision to deny a required permit is not, but regardless, in many cases a prop-

erty-owner plaintiff could challenge the rule underlying the agency's quasi-adjudicatory decision even if the decision itself were not considered "regulation."

2. "[T]ransfer[ing] an economic benefit to one or more private persons"

To be a "private use" under the regulatory takings provision, a regulation must "transfer an economic benefit to one or more private persons." Although at first glance this language appears to limit the reach of the regulatory takings provision, there are several reasons that it may nonetheless be applied broadly. First, the provision is not limited to regulations that *only* benefit one or a few private persons. Accordingly, a transfer of economic benefits to a narrow class of persons might qualify a regulation as a private use although the regulation also benefits the public generally. Regulatory takings jurisprudence under both the California and federal constitutions has long recognized that most, if not all, regulation reallocates economic benefits and burdens. "Traditional zoning regulations can transfer wealth from those whose activities are prohibited to their neighbors; when a property owner is barred from mining coal on his land, for example, the value of his property may decline but the value of his neighbor's property may rise." *Yee v. City of Escondido*, 503 U.S. 519, 529-30 (1992). The courts have recognized that regulations (either individually or collectively) typically provide an "average reciprocity of advantage," that is, a balance of both benefits and burdens to regulated entities. *See Penn. Coal.*, 260 U.S. at 415; *San Remo Hotel*, 27 Cal. 4th at 675-76. The benefits created by any particular regulation may not accrue equally to entities subject to the regulation and those that are not, but that fact has never converted such regulations into regulatory takings:

The necessary reciprocity of advantage lies not in a precise balance of burdens and benefits accruing to property from a single law, or in an exact equality of burdens among all property owners, but in the interlocking system of benefits, economic and noneconomic, that all the participants in a democratic society may expect to receive, each also being called upon from time to time to sacrifice some advantage, economic, or noneconomic, for the common good.

San Remo Hotel, 27 Cal. 4th at 675-76; *see also Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 491 (1987) ("Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others.").

It is indeed hard to imagine a regulation that does not create any economic benefit in one or more third parties even as it provides general public benefits. As the United

States Supreme Court noted in *Yee*, any land use regulation is likely to confer economic benefits on other property owners in the form of increased property values. *See Yee*, 503 U.S. at 529-30. Other environmental regulation, such as air or water pollution control regulation, might benefit competitors of the regulated entity by increasing the costs faced by the regulated entity without raising the competitors' costs.³ *See, e.g.*, Nicholas A. Ashford & George R. Heaton, *Regulation and Technological Innovation in the Chemical Industry*, 46 L. & Contemp. Probs. 109 (1980); Scott Barrett, *Environmental Regulation for Competitive Advantage*, 1991 Bus. Strategy Rev. 1. Regulation may also create entirely new industries that are fostered by the regulation, such as the pollution control equipment industry created by air and water quality regulation. *See, e.g.*, *Dana Corp. v. State*, 103 Cal. App. 3d 424 (1980) (rejecting takings claims brought by manufacturers of pollution control equipment based on State's repeal of air pollution regulation). It may also benefit existing industries that profit from the protection of environmental quality or ecosystems, such as the fishing industry or the outdoor recreation industries.

Furthermore, the Initiative fails to establish a minimum threshold of private economic benefit below which a regulation would be safe from invalidation. Accordingly, a regulation could be deemed a private use although it provides only minimal private economic benefits. And because the Initiative does not recognize the possibility of offsetting public benefits, those minor private benefits could justify invalidating a regulation that also produced enormous public benefits.

This result might be avoided if the phrase "transfers a benefit to one or more private persons" were read to mean "transfers a benefit *only* to one or more private persons." Nevertheless, the drafters did not include the crucial word "only," and there is a considerable risk that a court would not unilaterally read that concept into the Initiative.

Second, even if the Initiative were given a narrowing construction, its failure to define "one *or more* private persons" (emphasis added) means that even a benefit to a large group of persons could be considered a private use. "More than one" private persons includes two persons, but also 1,000. Indeed, "the public" is nothing more than a large group of more than one "private persons." Thus, for example, a land use regulation that establishes a residential use zone and provides economic benefits to the residents of that zone by preventing the location of inconsistent uses might benefit only the residents of the zone, but that group might be many thousands of "private persons."

³ In fact, this is precisely the point of some regulation. Environmental regulation encourages consumers to purchase products with fewer environmental impacts in their manufacture or use by raising the cost of competing products that have greater environmental impacts. That regulation thus benefits the manufacturers of the competing products at the expense of the manufacturers of products with greater impacts. This sort of regulation could be invalidated under the Initiative.

Finally, we note that the Initiative's definition of "public use" does not assist one in determining which regulations serve impermissible "private uses" and which appropriately serve "public uses." The definition of "public use" refers only to exercises of eminent domain, not regulation. See Initiative § 3 (adding Cal. Const. art. I, § 19(b)(2)). Regulation represents an exercise of government's "police power," a power distinct from the power of eminent domain. See *Hensler v. City of Glendale*, 8 Cal. 4th 1, 6-7 (1994); *Spring Street Co. v. City of Los Angeles*, 170 Cal. 24, 28 (1915) (referring to the "branch[es] of the power of sovereignty" as including "the taxing power, the police power, [and] the power of eminent domain").

3. "[I]n order to transfer"

One might argue that the provision's scope is limited because the words "in order to" in the phrase "in order to transfer an economic benefit to one or more private persons" would require a property-owner plaintiff to prove that the public agency *intended* to transfer an economic benefit to other private persons. Yet assuming a court were to read the Initiative to require a showing of intent, there is a substantial risk that a court would find that the adoption of most regulations meets the standard of intent. And the process of proving intent may itself deter regulation, because the Initiative appears to allow intrusive discovery into public officials' intent.

Assuming that it requires proof of intent, the Initiative does not indicate the kind of intent required. A court is likely, however, to apply the standard of intent typically applied in civil cases: "By that test, 'intent' 'denotes not only those results the actor desires, but also those consequences which he knows are substantially certain to result from his conduct.'" *Akins v. State*, 61 Cal. App. 4th 71, 36-37 (1998); see also *Marich v. MGM/UA Telecomm., Inc.*, 113 Cal. App. 4th 415, 422 (2003) (concluding that this standard "is used widely in civil actions"). That standard derives from tort law, see *Akins*, 61 Cal. App. 4th at 36-37; accord *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 172 (1999)), but *Akins* expressly held that it was applicable in an inverse condemnation action under Article I, Section 19.⁴ *Akins*, 61 Cal. App. 4th at 37. Accordingly, where public officials adopt a regulation knowing that it is "substantially certain" to transfer economic benefits to other private parties, they may be charged with "intending" that transfer. Thus even where a court interprets "one or more private persons" narrowly, it may be fairly easy for a plaintiff to prove that the public officials had the requisite knowledge that private parties would benefit.

⁴ Indeed, the United States Supreme Court analogized takings to torts in *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709, 715 (1999). See also *id.* at 726 (Scalia, J., concurring).

A court could limit the Initiative's application by requiring that a plaintiff prove a "purpose" or "desire" to benefit private persons, rather than simply knowledge that they would benefit. In other words, a court may demand that the public officials had in mind the specific purpose of providing an economic benefit to private parties and possibly to *specific* private parties. Nevertheless, such a reading would be more restrictive than the usual standard of intent in civil cases.

Further, whatever standard of intent is required, the Initiative could dramatically expand judicial inquiry into the motives of public officials, thereby straining the separation of powers and deterring public officials from adopting new regulation. Federal and California courts have assiduously rejected plaintiffs' attempts to inquire into public officials' motives in making legislative and adjudicatory decisions. See *United States v. Morgan*, 313 U.S. 409, 422 (1941); *City of Fairfield v. Superior Court*, 14 Cal. 3d 768, 772, 777 (1975); *24-Hour Towing v. City of San Diego*, 45 Cal. App. 4th 1294, 1304 (1996). These courts have prevented, for example, the taking of depositions of public officials regarding their decision-making thought processes underlying a quasi-adjudicatory decision. See *City of Fairfield*, 14 Cal. 3d at 772-73. Instead, the court's scrutiny of officials' intent has been limited to any formal findings adopted by the public agency. See *id.* at 778. This reluctance to scrutinize the decision making processes of legislative and administrative officials is rooted in the constitutional separation of powers and courts' desire to avoid interfering with the decision-making processes of coordinate branches of government. See *Bd. of Supervisors v. Superior Court*, 32 Cal. App. 4th 1616, 1623-24 (1995).

In stark contrast, the Initiative directs, "In any action by a property owner challenging a taking or damaging of his or her property, *the court shall consider all relevant evidence and exercise its independent judgment, not limited to the administrative record and without deference to the findings of the public agency.*" Initiative § 3 (adding Cal. Const. art. I, § 19(c)) (emphases added). If a public official's intent to benefit private third parties in enacting a regulation is relevant under the definition of "private use," subsection 19(c) would appear to require the court to admit all competent evidence of that intent. This subdivision, in concert with the Civil Discovery Act, Civ. Proc. Code § 2016.10 *et seq.*, thus could also require the court to allow full discovery of such evidence, including taking depositions of public officials. See Civ. Proc. Code § 2017.010 (allowing discovery of all nonprivileged matter "if the matter is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence"). Such discovery would be intrusive, and the threat of it alone could discourage public officials from enacting even wholly public-spirited regulation.⁵

⁵ Because discovery would be available in any case that could survive a demurrer or motion for summary judgment, it would not be limited to meritorious cases. As a result, the

4. “[T]aken or damaged”

The Initiative’s regulatory takings provision is included in its definition of “private use,” not in its definition of “taken.”⁶ A court therefore might conclude that a plaintiff must show both that his or her property has been “taken” or “damaged” by regulation *and* that such taking or damaging was “for private use” as defined in the Initiative. The court might then apply existing regulatory takings jurisprudence in determining whether the regulatory action had “taken” or “damaged” the plaintiff’s property. Indeed, the Initiative’s Statement of Purpose states that “State and local governments may not use their power *to take or damage* private property for the benefit of any private person or entity.” Initiative § 2(b) (emphasis added). As discussed above, courts find that property has been “taken” by regulation only in exceptional circumstances in which the regulation has severely impaired the value of private property. Under this standard, very few regulations would be invalidated as serving “private uses,” and the regulatory takings provision would have little effect.⁷

Although we would argue that this is the better interpretation of the Initiative, there is a risk that a court would conclude that the Initiative was intended to expand the meaning of “taken” and “damaged” beyond their traditional scope. As noted above, the general intent of the Initiative is plainly to expand government liability for actions that interfere with the use of private property. The inclusion of the phrase “at the expense of the property owner” in the definition of private use may also be read to establish a much lower threshold of impact to the property owner than that applied under traditional takings jurisprudence. If a property-owner plaintiff must prove the severe impact on property that existing takings law requires, the requirement that the transfer of economic benefit be “at the expense of the property owner” would be superfluous. Finally, applying the traditional meaning of “taken or damaged” in Article I, Section 19 would render

threat of invasive discovery itself would deter as much legitimate regulation as it would deter invalid private-purpose regulation.

⁶ Proposition 90’s regulatory takings provision, by contrast, was included in a definition of “damaged.”

⁷ In this application, the provision would do little more than change the remedy available to a plaintiff whose property has been taken or damaged for a private use as defined in the Initiative. Existing regulatory takings jurisprudence would dictate that the proper remedy would be payment of just compensation, not invalidation of the regulation. See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987); *Suitum v. Tahoe Reg’l Planning Agency*, 520 U.S. 725, 748 (1997) (Scalia, J., concurring); *Ruckleshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984). The Initiative, by contrast, would authorize an injunction to bar enforcement of the regulation. Initiative § 3 (adding Cal. Const. art. I, § 19(c)).

the regulatory takings provision of the Initiative nearly meaningless, which a court would be loath to do. *See Big Creek Lumber Co. v. County of Santa Cruz*, 38 Cal. 4th 1139, 1155 (2006).

5. Application to existing regulation

The Initiative does not explicitly indicate whether the regulatory takings provision applies to existing, or only future, regulation. The provision simply defines the covered regulation as “private uses,” apparently regardless of whether that regulation is existing or has yet to be adopted. As a result, a court could conclude that the provision applies to existing as well as future regulations. A property owner therefore could file a facial challenge to an existing regulation in which he or she would ask the court to invalidate the existing regulation because it serves a private use on its face. Alternatively, he or she could wait until the existing regulation is applied to his or her property in a quasi-adjudicatory decision and then file an as-applied challenge to the regulation. For example, a property owner might seek to invalidate an existing zoning ordinance altogether, or he or she might wait until the public agency has denied a development application based on the ordinance and then challenge the denial as a private use.

6. Nuisances

In another new subsection of Article I, Section 19, the Initiative provides that “Nothing in this section prohibits a public agency from exercising its *power of eminent domain* to abate public nuisances or criminal activity.” Initiative § 3 (adding Cal. Const. art. I, § 19(f)) (emphasis added). Given its limitation to “eminent domain,” this subsection probably would not exempt from the regulatory takings provision *regulation* designed to prevent or abate nuisances. The Initiative’s distinct references to “eminent domain” and “regulation” imply that they are different things. *See* Initiative § 3 (adding Cal. Const. art. I, § 19(b)(3) (distinguishing “transfer of ownership, occupancy, or use of private property” from “regulation of the ownership, occupancy or use of privately owned real property”). Indeed, as described above in Section I.B.3, regulation represents an exercise of government’s “police power,” not its power of eminent domain. *See Hensler*, 8 Cal. 4th at 6-7 (1994); *Spring St. Co.*, 170 Cal. at 28. Consequently, public agencies could be unable to prevent property owners from using their property in ways that are clearly harmful to other property owners⁸ or to the community at large.

⁸ In fact, regulation to prevent nuisances might especially be found to be a private use, insofar as abatement of a nuisance that harms other properties would plainly raise the value of those properties. As such, the Initiative cuts to the heart of one of the most basic purposes of government: protecting property from the depredations of others. *See* John Locke, *Second Treatise on Government* § 127 (1689) (“The inconveniencies [*sic*] that

By failing to exempt regulatory action to prevent or abate nuisances, the Initiative goes far beyond the traditional scope of regulatory takings jurisprudence. Even the high water mark of the Supreme Court's solicitude for regulatory takings claims, *Lucas v. South Carolina Coastal Council*, explicitly recognized an exception for government action that merely seeks to prevent or abate uses of property that would be considered nuisances at common law. *See Lucas*, 505 U.S. at 1029.

D. The Effects of Uncertainty

The foregoing discussion has noted several areas of ambiguity in the Initiative. Regardless of how they are resolved by the courts, those ambiguities would engender widespread, protracted, and expensive litigation regarding the Initiative's scope and application. Responding to such litigation will require that public agencies either divert their resources away from implementing their substantive missions or increase taxes to cover the cost of the litigation. Moreover, the risk of litigation alone will likely deter many agencies from advancing their missions. As a result, in assessing the Initiative's effect on public regulation, one should assume that risk-averse agencies will resolve the Initiative's ambiguities by declining to adopt or implement a regulation that might be invalidated by the Initiative.

E. Comparison to Proposition 90

Proposition 90 could have restricted a wide variety of land use and environmental regulatory programs. Because the present Initiative lacks several of Proposition 90's limiting provisions, the Initiative could have a more far-reaching impact for four reasons.

First, Proposition 90 would have required state and local regulatory agencies to pay compensation to property owners for "government actions that result in *substantial* economic loss to private property." Prop. 90 § 3 (adding Cal. Const. art. I, § 19(b)(8)) (emphasis added). The Initiative, in contrast, would restrict a broader variety of regulation than Proposition 90 because it applies to regulation imposed merely "at the expense of the property owner."⁹ Initiative § 3 (adding Cal. Const. art. I, § 19(b)(3)(iii)). That expense need not be "substantial" and in fact could be minor.

[men] are [in the state of Nature] exposed to by the irregular and uncertain exercise of the power every man has of punishing the transgressions of others, make them take sanctuary under the established laws of government, and therein seek the preservation of their property."), *available at* <<http://socserv2.mcmaster.ca/~econ/ugcm/3113/locke/government.pdf>>.

⁹ Although the Initiative appears narrower than Proposition 90 in that the Initiative applies only to "regulation," while Proposition 90 would have covered "any statute, charter

Second, Proposition 90 exempted from its compensation requirement regulations that “protect public health and safety.” Prop. 90 § 3 (adding Cal. Const. art. I, § 19(b)(8)). This exemption potentially immunized a variety of environmental regulations. The Initiative, however, provides no such exemption.

Third, Proposition 90 exempted regulation already in effect on its date of enactment and any amendment to existing regulation that “serves to promote the original policy of” and “does not significantly broaden the scope of application of” the regulation. Prop. 90 § 6. The Initiative, by contrast, includes no comparable exemption and thus could be applied to all existing and future regulation that transfers an economic benefit. *See supra* Section I.B.5.

Finally, whereas Proposition 90 limited the remedy for a regulatory taking to monetary compensation (the traditional remedy for a regulatory taking; *see supra* note 7), the Initiative would permit a court to enjoin any regulation effecting a taking for private use, as an alternative or in addition to monetary compensation. Initiative § 3 (adding Cal. Const. art. I, § 19(c)). Where the owner of real estate subject to environmental or land use regulation files suit and obtains an injunction, the defendant public agency would be unable to impose that regulation, even if it were willing to pay for it.¹⁰

F. The Impact of the Regulatory Takings Provision on Environmental Protection and Land Use Planning

If the Initiative were to be given an expansive reading, it could severely limit state and local governments’ ability to protect the environment and plan for the orderly development of land. We list below some of the most significant categories of environmental and land use regulation that might be invalidated if the Initiative passes. Several examples are accompanied by citations to cases where such regulations were unsuccessfully challenged as regulatory takings under existing law.

provision, ordinance, resolution, law, rule or regulation,” Prop. 90 § 3 (adding Cal. Const. art. I, § 19(b)(8)), the foregoing list of actions is encompassed within the broad definition of “regulation.” As a practical matter, the Initiative and Proposition 90 apply to the same types of government regulation of land.

¹⁰ The Initiative is nevertheless narrower than Proposition 90 in one respect: the Initiative applies to real estate only, while Proposition 90 applied to any property, personal or real. Initiative § 3 (adding Cal. Const. art. I, § 19(b)(3)(iii)) (“regulation of the ownership, occupancy or use of privately owned real property”). This distinction is largely irrelevant for purposes of environmental regulation, however, because much environmental regulation restricts uses of real property and thus would be subject to the Initiative.

- **Global climate change**—AB 32, the Global Warming Solutions Act of 2006, 2006 Cal. Stat. ch. 488, directs the California Air Resources Board to develop a regulatory program to reduce greenhouse gas emissions in California to 1990 levels by 2020. The imposition of greenhouse gas emissions standards on stationary sources of greenhouse gases, such as power plants, oil refineries, and cement plants, could be considered a “private use.” It would regulate these “uses” of real property and would benefit private parties by reducing harm from global warming. Moreover, such regulation could benefit the pollution control industry and favor low-polluting firms over high-polluting firms. Local or state regulation of real estate development to reduce vehicle miles traveled and thus to reduce transportation emissions would also certainly be a regulation of the use of real property and could provide economic benefits to adjacent owners of already developed land. Finally, the Initiative could interfere with government’s ability to adapt to climate change by restricting new development in areas likely to be threatened by climate change, such as floodplains, low-lying coastal areas, and areas prone to wildfire. Again, owners of adjacent already-developed property could benefit.

- **Land use regulation**—Land use regulation is the regulatory field most obviously affected by the Initiative. By restricting the location, density, design, height, and extent of development, a general plan or zoning ordinance may significantly reduce a property’s value relative to its unzoned or previously zoned condition and simultaneously raise the value of other properties. *See Yee*, 503 U.S. at 529-30. The Initiative thus could prevent local governments from limiting the location of liquor stores, adult businesses, “big box” megastores, heavy industry, and other land uses that could be harmful to surrounding communities. Further specific examples of potentially affected planning and zoning regulation designed to protect environmental values are described below.
 - *See Tahoe-Sierra Preservation Council v. Tahoe Reg’l Planning Agency*, 322 F.3d 1064 (9th Cir. 2003) (dismissing claim that taking occurred during building moratorium while TRPA was assessing individual properties’ environmental suitability for building); *Loewenstein v. City of Lafayette*, 103 Cal. App. 4th 718 (2002) (denying taking claim and holding that “monitoring of density and hillside slope requirements are legitimate governmental interests”); *Del Oro Hills v. City of Oceanside*, 31 Cal. App. 4th 1060 (1995) (finding no taking where residential growth control amendment to general plan hindered plaintiff in selling parcels within 1200-unit development); *Guinnane v. San Francisco Planning Comm’n*, 209 Cal. App. 3d 732 (1989) (rejecting landowner’s regulatory takings claim where city denied development permit to preserve neighborhood character and aesthetic values).

- **Protection of coastal areas**—Restriction of development in the coastal zone has been very successful in protecting California’s coastal resources, but it is restrictive of what property owners in the coastal zone can do with their properties. Many activities are strictly prohibited in the zone and development (which is very broadly defined in the Coastal Act) is restricted. Beyond their substantial public benefits, these regulations can provide economic benefits to a variety of private property owners, particularly owners of coastal properties that have already been developed, whose property values increase because development on adjacent properties is restricted. Similarly, the Coastal Commission often requires developers to provide public coastal access as a condition of development approval, which also may benefit nearby residential and commercial property owners, who enjoy the availability of nearby coastal access.
 - *See Landgate, Inc. v. Cal. Coastal Comm’n*, 17 Cal. 4th 1006 (1998) (upholding Coastal Commission’s ability to deny construction permit because of legitimate government interests in minimizing erosion and unsightly development on coast).

- **Protection of resource lands**—Regulation of resource extraction on private forest land or rangeland could be considered impermissible private uses by increasing the value of adjacent properties that benefit from less intensive use of the regulated property. Restrictions on timber harvesting could also economically benefit firms that obtain timber from less regulated states or nations and the fishing industry, which benefits from improved water quality produced by timber harvest restrictions in spawning habitat.
 - *See Seiber v. United States*, 364 F.3d 1356, 1369 (Fed. Cir. 2004) (finding no authority “that holds as a matter of federal takings law that trees are a separate property interest before they are severed from their underlying land”).

- **Protection of species and their habitats**—Existing or future regulation to protect rare and other special status species on private land might be invalidated. Prevention of new development on land where special status species are located will likely raise the value of adjacent properties without the species.
 - *See Boise Cascade Corp. v. United States*, 296 F.3d 1339 (Fed. Cir. 2002) (finding no taking of property in timber from enforcement of Endangered Species Act against logging operation).

- **Protection of wetlands**—Given the United States Supreme Court’s recent narrowing of the federal Clean Water Act’s provision for the protection of wetlands (§ 404) in *Rapanos v. United States*, 126 S. Ct. 2208 (2006), state and local governments may step into the breach to ensure continuing protection for some wetlands. The Initiative could invalidate regulation of the filling of wetlands on

private land because, in some cases, the regulation may prohibit development on portions of a parcel of property. Again, prohibiting development on a wetland parcel may raise the property value of adjacent already developed parcels.

- *See Norman v. United States*, 429 F.3d 1081, 1091-94 (Fed. Cir. 2005) (denying regulatory taking claim based on re-delineation of wetlands).
- **Restrictions on water diversions**—State and federal law often limits the exercise of water rights to protect special status aquatic species and their habitats, to prevent the waste of water, and to protect other water rights holders. The Initiative’s reference to “privately owned real property *or associated property rights*” (emphasis added) on its face would appear to include water rights and thus might require compensation where the State Water Resources Control Board restricts water diversions to protect in-stream values or other purposes. Riparian property owners, commercial fishermen, and outdoor recreation businesses are among the “private persons” who would likely benefit from such restrictions.
 - *See Nat’l Audubon Soc’y v. Superior Court*, 33 Cal. 3d 419 (1983) (holding that public trust doctrine would bar takings claim challenging restrictions on water diversion to protect fish); *Allegretti & Co. v. County of Imperial*, 138 Cal. App. 4th 1261 (2006) (rejecting regulatory takings claim where county restricted landowner’s right to use groundwater).
- **Imposition of effluent limitations to protect water quality**—A Regional Water Quality Control Board’s imposition of effluent limitations or waste discharge requirements in a discharge permit under the Porter-Cologne Water Quality Act, or the mere requirement that the property owner obtain a discharge permit, may be invalidated as a private use. Such limitations often require the polluter to purchase pollution control technology, which would benefit pollution control equipment manufacturers. It also could confer a benefit on water-quality sensitive uses, such as suppliers of drinking water, the fishing industry, or businesses engaged in water-based recreation. Regulation of discharges to water may also increase property values for riparian properties.
- **Air quality regulation**—Like water quality regulation, regulation of stationary sources of air pollution (some of which is effectively compelled by the federal Clean Air Act), as opposed to mobile source regulation, could easily be found to be a private use, even if the pollution in question would amount to a nuisance. *See supra* Section I.B.6. Such regulation may benefit private persons by raising property values, benefiting competitors, and creating a pollution control industry.
- **Hazardous substances regulation**—The State implements a variety of regulatory programs that affect the use, storage, treatment, or disposal of hazardous materials

and wastes on private property. These programs may provide economic benefits to surrounding property owners in the form of higher property values and to competitors whose products do not use toxic materials in their manufacturing. They may also provide benefits to the consultants and disposal facility owners who assist regulated entities in complying with the regulations.

- *See Morning Star Co. v. State Bd. of Equalization*, 115 Cal. App. 4th 799 (2004) (holding hazardous waste fee not a taking), *rev'd on other grounds*, 38 Cal. 4th 324 (2006).

- **Protection of cultural resources**—Regulations limiting development to protect cultural resources, such as historic landmarks, cultural artifacts, and burial sites, are likely to be considered private uses because they require landowners to leave portions of their properties undeveloped, potentially to the benefit of adjacent landowners.
 - *See Penn Cent. Transp. Co. v. City of New York*, 483 U.S. 104 (1978) (upholding ordinance protecting Grand Central Terminal as a historic structure and preventing its lucrative redevelopment); *Lincoln Place Tenants Ass'n v. City of Los Angeles*, 130 Cal. App. 4th 1491 (2005) (in approving development project, city required to consider historical importance of structure to be demolished).
- **“Smart growth” regulation**—Local governments are increasingly seeking to regulate development to ensure compact, walkable, and transit-friendly communities by facilitating higher density development in already developed areas and limiting development on the outskirts of those areas. Such smart growth controls could be found to serve private uses by benefiting commercial property owners in downtown areas and residential owners adjacent to outlying properties that would remain undeveloped.
- **California Environmental Quality Act (“CEQA”)**—CEQA requires public agencies to perform environmental impact evaluations for their proposed projects, including for the issuance of approvals for private projects, and requires that significant environmental effects of those projects be mitigated to the extent feasible. Public agencies typically require regulated entities (such as real estate developers) to implement, at their own expense, mitigation measures to reduce the significant impacts of their projects. The Initiative could prevent cities, counties, and other public agencies (such as the Coastal Commission) that approve development or other private projects from requiring implementation of environmental mitigation. That mitigation often benefits adjacent property owners.

- *See Allegretti & Co. v. County of Imperial*, 138 Cal. App. 4th 1261 (2006) (holding refusal to issue a well permit for applicant's failure to comply with CEQA was not a taking of groundwater).
- **Development restrictions to protect water quality**—Localities implement a variety of restrictions on development designed to protect water quality. These include riparian setback requirements that prevent development or agricultural or silvicultural activities in buffer zones surrounding riparian areas (to prevent soil erosion and protect water quality) and stormwater control requirements such as construction and operation of retention basins. These restrictions may require compensation if they prevent property owners from making chosen uses of riparian portions of their property, require property owners to devote land to construction of retention basins, or otherwise require the construction of expensive stormwater control infrastructure. All of these restrictions can confer benefits on other private persons for the reasons discussed in the context of water quality regulation.
- **Mining and quarrying regulations**—Local governments often regulate or even prohibit the operation of mines and quarries because of the noises, odors, and dust they create. As *Yee* expressly indicated, these regulations typically increase adjoining property values. *See Yee*, 503 U.S. at 529-30.
 - *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) (finding no taking from state regulation that restricted removal of coal columns necessary to prevent subsidence); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (finding no taking where city prohibited operation of brick quarry within city limits).
- **View and ridgeline protection policies**—Some localities have adopted ordinances to protect special scenic views, limiting development in specific “viewsheds,” or prohibiting or restricting development along prominent ridgelines. The Coastal Act also dictates that coastal views be protected. Pub. Res. Code § 30251. Because these policies limit areas of private property where development can occur, and indeed may prevent development in the portions of the property where that development would be most profitable (e.g., along ridgelines with commanding views), the regulations would impair the value of the regulated property while potentially raising the values of other properties, such as those that enjoy the protected views.
 - *Kucera v. Lizza*, 59 Cal. App. 4th 1141 (1997) (rejecting claim that view and sunlight preservation ordinance created taking by exceeding town's police power and legitimate health and safety concerns); *Comm. for Reasonable Regulation of Lake Tahoe v. Tahoe Reg'l Planning Agency*, 311 F. Supp. 2d

972 (D. Nev. 2004) (dismissing challenge to TRPA ordinance that established new design standards and compliance options to minimize visual impacts of development on lakefront); *Hensler v. City of Glendale*, 8 Cal. 4th 1 (1994) (denying takings claim against city's ridgeline protection ordinance).

- **Regulation to preserve rural character**—Many rural communities adopt General Plan policies or zoning provisions designed to prevent the loss of the community's traditional rural character to suburbanization or exurbanization. These measures may include imposing minimum lot sizes and rural low-density zoning. Many such measures reduce the development potential of property while potentially raising the value of adjacent already developed property.
 - *See Barancik v. County of Marin*, 872 F.2d 834 (9th Cir. 1988) (dismissing challenge to zoning code's transfer of development rights program for ranching and agricultural areas); *Shea Homes Ltd. P'ship v. County of Alameda*, 110 Cal. App. 4th 1246 (2003) (upholding initiative amending county area plan to restrict sprawl and preserve land for agriculture and open space).

- **Planning moratoria**—Many public agencies rely on moratoria on new development to preserve the status quo and allow the agency to study the desirability of a new regulatory program. *See, e.g.*, Gov't Code § 65858. Moratoria may prevent landowners from making use of their land, possibly for many years, thus potentially benefiting adjacent already developed property.
 - *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 306 (2002) (holding that temporary planning moratoria do not constitute a per se taking of property, thus helping protect the "uniquely beautiful" qualities of Lake Tahoe).

- **Urban growth boundaries ("UGBs")**—Every year, more California localities are adopting UGBs, often through the local initiative process. UGBs create an outer boundary for urban development in a city and therefore protect surrounding open space or agricultural land and reduce sprawl. While UGBs reduce the development potential, and thus the market value, of undeveloped properties outside the development boundary, they can increase the value of properties inside the boundary and already developed properties outside the boundary.
 - *See Shea Homes Ltd. P'ship v. County of Alameda*, 110 Cal. App. 4th 1246 (2003).

- **Development impact fees**—Public agencies often impose impact fees on new development to be used for public transportation, schools, environmental mitigation, affordable housing, child care, or parks. For example, from 1998 to 2006, development impact fees generated more than \$6 billion for the construction of new

schools. Eric Brunner, *Financing School Facilities in California*, Institute for Research on Education Policy and Practice (2007). Since 1985, San Francisco has received approximately \$5 million for childcare, \$10 million for parks, and \$135 million for affordable housing from development impact fees. While not all development impact fees are used for environmental mitigation, without these fees government would be forced to divert funds from environmental protection and land use regulation to pay for basic infrastructure and services necessitated by new development. Although these fees must be roughly proportional to the impact of the development on public facilities or services, third parties can also benefit from the fees. Existing development obtains an economic benefit in the use of, or increased property value from, new public facilities, such as parks and schools, financed in part with impact fees.

- o *See San Remo Hotel, Inc. v. City & County of San Francisco*, 27 Cal. 4th 643 (2002) (affirming denial of takings claim based on affordable housing impact fee); *Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek*, 4 Cal. 3d 633 (1971) (upholding City's ability to impose property taxes in addition to requiring dedication of park land or payment of in-lieu fee).

II. The Initiative's Impact on the Use of Eminent Domain to Protect the Environment

Beyond the regulatory takings provision, the Initiative's definition of "private use" includes the following: "transfer of ownership, occupancy or use of private property or associated property rights to a public agency for the consumption of natural resources *or for the same or a substantially similar use as that made by the private owner.*" Initiative § 3 (adding Cal. Const. art. I, § 19(b)(ii)) (emphasis added); *see also id.* § 2(d) ("Statement of Purpose"; "State and local governments may not take private property by eminent domain and put it to the same use as that made by the private owner."). The italicized language appears to prohibit many uses of condemnation designed to protect existing environmental conditions.

The impact of this provision would depend on the breadth of meaning given by a court to the word "use," but it could be read to prohibit condemnation to preserve the existing environment for purposes such as protection of open space or wildlife habitat. Indeed, "open space" is often referred to in the land use planning context as a "use." *See, e.g.,* Gov't Code § 65850(a) (authorizing cities and counties to "Regulate the *use* of . . . land as between industry, business, residences, *open space*, including agriculture, recreation, enjoyment of scenic beauty, use of natural resources, and other purposes" (emphases added)); *Muzzy Ranch Co. v. Solano County Airport Land Use Comm'n*, 41 Cal. 4th 372, 389 (2007) (referring to "open space uses"); *Pardee Constr. Co. v. City of Camarillo*, 37

Cal. 3d 465, 467 (1984) (quoting a master land use plan as referring to “uses . . . such as parks [and] open spaces”); *County of Colusa v. Cal. Wildlife Conservation Bd.*, 145 Cal. App. 4th 637, 653-54 (2006) (referring to open space and wetland restoration as “uses”). Where a property is in a largely natural or “open space” condition, condemnation of the property to preserve that condition could be found to continue “the same or a substantially similar use as that made by the private owner.”¹¹

The provision might also prohibit condemnation to preserve a property being used for agriculture or other low intensity natural resource extraction, even if those practices would be discontinued by the public agency, on the grounds that the preservation “use” is “substantially similar” to the low intensity extractive use. See Gov’t Code § 65560(a)(2) (including in the definition of “open space lands,” “[o]pen space used for the managed production of resources, including but not limited to, forest lands, rangeland, agricultural lands and areas of economic importance for the production of food or fiber; . . . and areas containing major mineral deposits, including those in short supply”); Gov’t Code § 65850(a) (defining “agriculture” and “use of natural resources” as “open space” uses); *County of Colusa*, 145 Cal. App. 4th at 653 (holding that “The focus of the Williamson Act is on agricultural land, including agricultural land *as* open space.” (emphasis in original)).

Public agencies may use eminent domain to preserve habitat or other environmental values in a variety of settings:

- **Parks**—Public agencies often use eminent domain to obtain land for new public parks or to expand existing parks. Many of the properties that now make up Point Reyes National Seashore were purchased by the federal government with the power of eminent domain. Some of those properties remain as working farms, precisely the same use made prior to condemnation.
- **Open space**—Public agencies sometimes use eminent domain simply to protect undeveloped land from development and preserve it as open space, whether or not the property is subsequently used as a park. As discussed above, a court could easily find the use of eminent domain for open space protection to be a continuation of the use of undeveloped land made by the private owner, even if that prior use was a low intensity extractive use.
 - *City & County of San Francisco v. Golden Gate Heights Invs.*, 14 Cal. App. 4th 1203, 1206 (1993) (condemnation to preserve open space); *Smith v. City &*

¹¹ Indeed, the very notion of “preservation” assumes that existing conditions are retained. See *The Compact Oxford English Dictionary* 1421 (2d ed. 1989) (defining “preserve” as “to keep in existence, . . . [t]o keep up, maintain (a state of things)”).

County of San Francisco, 225 Cal. App. 3d 38, 42 (1990) (condemnation to preserve open space).

- **Resource lands**—Public agencies may also use eminent domain to acquire and protect agricultural, forest, or ranch lands. Public agencies may seek to preserve both the open space character of the land and the traditional character of the use made of the property where that use is consistent with the land’s preservation as open space.
- **Habitat**—Public agencies may use eminent domain to acquire species habitat and protect it from development. That protection would require preserving the existing undeveloped state of the property.
 - *See Contra Costa Water Dist. v. Vaquero Farms, Inc.*, 58 Cal. App. 4th 883 (1997) (condemnation of primarily undeveloped land to be used for the construction of a reservoir and water supply project, as well as providing land set aside as environmental mitigation as habitat for endangered species).
- **Ecosystem services**—Condemnation can be used to protect the “services” that society receives from properly functioning natural systems. For example, beyond their value as habitat, wetlands can improve water quality in and absorb flood waters from adjacent water bodies. Purchasing and preserving wetland tracts protects these important ecosystem services, but it requires maintaining the land in its existing condition.
- **Water quality**—Public agencies may use eminent domain to purchase private property located in the headwaters of rivers that supply drinking water. Condemnation of those properties and preservation of them in their natural state can be a cost-effective way to protect drinking water quality. Indeed, New York State has purchased land to protect New York City’s drinking water sources in Upstate New York. *See* Committee to Review the New York City Watershed Management Strategy, National Research Council, *Watershed Management for Potable Water Supply: Assessing the New York City Strategy* (2000).
- **Access to Parks and Public Lands**—Cities and public agencies have sometimes used eminent domain to construct or complete trails and access ways to parks and public lands. For example, the City of San Jose is contemplating condemnation of an easement to complete the Guadalupe Creek Park Trail. *See* <http://www.sanjoseca.gov/clerk/Agenda/041007/041007_05.03.pdf>. Such uses of condemned property could largely continue the property’s existing condition.

- **Historic Preservation**—Public agencies have sometimes used the power of eminent domain to protect historic structures that are not being maintained by their private owners. Protection of a building in its existing state could be considered to continue the preexisting “use.”

Finally, we note that this restriction on eminent domain would also prevent local governments from using eminent domain to achieve many of the goals that the Initiative would prevent them from achieving through regulation. In other words, unable to use regulation to prevent the development of a polluting facility or big box retail store, a local government might seek to condemn the land to ensure it is not put to such a use. Doing so may involve continuing the existing use of the property, however, and thus the use of eminent domain could be barred by proposed Section 19(b)(ii).

CONCLUSION

Although the Initiative’s text presents several interpretive uncertainties, it has the realistic potential to prevent and undo numerous categories of public regulation. Moreover, whether courts read the Initiative expansively or narrowly, the uncertainty produced by the Initiative’s manifold ambiguities would persist through many years of litigation. That inevitable litigation would impose an enormous fiscal burden on government agencies. That burden would require some combination of increased revenue from new taxes and fees and curtailment of the regulatory programs that could produce litigation.

This letter contains our analysis based on the information currently available. Should new facts or legal issues arise concerning the Initiative, we will be available to update our letter to consider this new information, if requested. We welcome any further questions you may have about the Initiative or its implications for environmental protection and land use regulation in California.

Very truly yours,

SHUTE MIHALY & WEINBERGER LLP



MATTHEW D. ZINN
FRAN M. LAYTON
ANDREW W. SCHWARTZ

EXHIBIT A

HOWARD JARVIS
TAXPAYERS
ASSOCIATION



HOWARD JARVIS, Founder (1903-1986)
ESTELLE JARVIS, Honorary Chairwoman
JON COUPAL, President
TREVOR GRIMM, General Counsel
TIMOTHY BITTLE, Director of Legal Affairs

May 1, 2007

Ms. Patricia Galvan, Initiative Coordinator
Attorney General's Office
1515 K Street, 6th Floor
Sacramento, CA 95814

RECEIVED
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Re: California Property Owners and Farmland Protection Act

INITIATIVE COORDINATOR
ATTORNEY GENERAL'S OFFICE

Dear Ms. Galvan:

By this letter, we respectfully request the Attorney General to prepare a title and summary of the chief purpose and points of the California Property Owners and Farmland Protection Act, a copy of which is attached. The undersigned are the proponents of this measure. **We also hereby withdraw Initiative No. 07-0003.** Although our previous initiative and the attached proposal both deal with eminent domain and property rights, there are substantial differences between the two.

Any correspondence regarding this initiative should be directed to Howard Jarvis Taxpayers Association, 921 Eleventh Street, Suite 1201, Sacramento, CA 95814 (916) 444-9950. The proponents' resident addresses are attached to this letter.

Enclosed is the required \$200 filing fee as well as the certification as required by Elections Code Section 18650.

Thank you for your cooperation.

Sincerely,

Sincerely,

Sincerely,

Doug Mosebar
President, California Farm
Bureau Federation

Jon Coupal
President Howard
Jarvis Taxpayers
Association

Jim Nielsen
Chairman, Cal.
Alliance to Protect
Private Property
Rights

SECTION 1. STATEMENT OF FINDINGS

(a) Our state Constitution, while granting government the power of eminent domain, also provides that the people have an inalienable right to own, possess, and protect private property. It further provides that no person may be deprived of property without due process of law, and that private property may not be taken or damaged by eminent domain except for public use and only after just compensation has been paid to the property owner.

(b) Notwithstanding these clear constitutional guarantees, the courts have not protected the people's rights from being violated by state and local governments through the exercise of their power of eminent domain.

(c) For example, the U.S. Supreme Court, in *Kelo v. City of New London*, held that the government may use eminent domain to take property from its owner for the purpose of transferring it to a private developer. In other cases, the courts have allowed the government to set the price an owner can charge to sell or rent his or her property, and have allowed the government to take property for the purpose of seizing the income or business assets of the property.

(d) Farmland is especially vulnerable to these types of eminent domain abuses.

SECTION 2. STATEMENT OF PURPOSE

(a) State and local governments may use eminent domain to take private property only for public uses, such as roads, parks, and public facilities.

(b) State and local governments may not use their power to take or damage property for the benefit of any private person or entity.

(c) State and local governments may not take private property by eminent domain to put it to the same use as that made by the private owner.

(d) When state or local governments use eminent domain to take or damage private property for public uses, the owner shall receive just compensation for what has been taken or damaged.

(e) Therefore, the people of the state of California hereby enact the "California Property Owners and Farmland Protection Act."

SECTION 3. AMENDMENT TO CALIFORNIA CONSTITUTION

Section 19 of Article I of the California Constitution is amended to read:

SEC. 19(a) Private property may be taken or damaged only for a stated public use and when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation. Private property may not be taken or damaged for private use.

(b) For purposes of this section:

(1) "Taken" includes transferring the ownership, occupancy, or use of property from a private owner to a public agency or to any person or entity other than a public agency, or limiting the price a private owner may charge another person to purchase, occupy or use his or her real property.

(2) "Public use" means use and ownership by a public agency or a regulated public utility for the public use stated at the time of the taking, including public facilities, public transportation, and public utilities, except that nothing herein prohibits leasing limited space for private uses incidental to the stated public use; nor is the exercise of eminent domain prohibited to restore utilities or access to a public road for any private property which is cut off from utilities or access to a public road as a result of a taking for public use as otherwise defined herein.

(3) "Private use" means:

(i) transfer of ownership, occupancy or use of private property or associated property rights to any person or entity other than a public agency or a regulated public utility;

(ii) transfer of ownership, occupancy or use of private property or associated property rights to a public agency for the consumption of natural resources or for the same or a substantially similar use as that made by the private owner; or

(iii) regulation of the ownership, occupancy or use of privately owned real property or associated property rights in order to transfer an economic benefit to one or more private persons at the expense of the property owner.

(4) "Public agency" means the state, special district, county, city, city and county, including a charter city or county, and any other local or regional governmental entity, municipal corporation, public agency-owned utility or utility district, or the electorate of any public agency.

(5) "Just compensation" means:

(i) for property or associated property rights taken, its fair market value;

(ii) for property or associated property rights damaged, the value fixed by a jury, or by the court if a jury is waived;

(iii) an award of reasonable costs and attorney fees from the public agency if the property owner obtains a judgment for more than the amount offered by a public agency as defined herein; and

(iv) any additional actual and necessary amounts to compensate the property owner for temporary business losses, relocation expenses, business reestablishment costs, other actual and reasonable expenses incurred and other expenses deemed compensable by the Legislature.

(6) "Prompt release" means that the property owner can have immediate possession of the money deposited by the condemnor without prejudicing his or her right to challenge the determination of fair market value or his or her right to challenge the taking as being for a private use.

(7) "Owner" includes a lessee whose property rights are taken or damaged.

(8) "Regulated public utility" means any public utility as described in Article XII, section 3 that is regulated by the California Public Utilities Commission and is not owned or operated by a public agency. Regulated public utilities are private property owners for purposes of this article.

(c) In any action by a property owner challenging a taking or damaging of his or her property, the court shall consider all relevant evidence and exercise its independent judgment, not limited to the administrative record and without deference to the findings of the public agency. The property owner shall be entitled to an award of reasonable costs and attorney fees from the public agency if the court finds that the agency's actions are not in compliance with this section. In addition to other legal and equitable remedies that may be available, an owner whose property is taken or damaged for private use may bring an action for an injunction, a writ of mandate, or a declaration invalidating the action of the public agency.

(d) Nothing in this section prohibits a public agency or regulated public utility from entering into an agreement with a private property owner for the voluntary sale of property not subject to eminent domain, or a stipulation regarding the payment of just compensation.

(e) If property is acquired by a public agency through eminent domain, then before the agency may put the property to a use substantially different from the stated public use, or convey the property to another person or unaffiliated agency, the condemning agency must make a good faith effort to locate the private owner from whom the property was taken, and make a written offer to sell the property to him at the price which the agency paid for the property, increased only by the fair market value of any improvements, fixtures, or appurtenances added by the public agency, and reduced by the value attributable to any removal, destruction or waste of improvements, fixtures or appurtenances that had been acquired with the property. If property is repurchased by the former owner under this subdivision, it shall be taxed based on its pre-condemnation enrolled value, increased or decreased only as allowed herein, plus any inflationary adjustments authorized by subdivision (b) of Section 2 of Article XIII A. The right to repurchase shall apply only to the owner from which the property was taken, and does not apply to heirs or successors of the owner or, if the owner was not a natural person, to an entity which ceases to legally exist.

(f) Nothing in this section prohibits a public agency from exercising its power of eminent domain to abate public nuisances or criminal activity;

(g) Nothing in this section shall be construed to prohibit or impair voluntary agreements between a property owner and a public agency to develop or rehabilitate affordable housing.

(h) Nothing in this section prohibits the California Public Utilities Commission from regulating public utility rates.

(i) Nothing in this section shall restrict the powers of the Governor to take or damage private property in connection with his or her powers under a declared state of emergency.

SECTION 4. IMPLEMENTATION AND AMENDMENT

This section shall be self-executing. The Legislature may adopt laws to further the purposes of this section and aid in its implementation. No amendment to this section may be made except by a vote of the people pursuant to Article II or Article XVIII.

SECTION 5. SEVERABILITY

The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

SECTION 6. EFFECTIVE DATE

The provisions of this Act shall become effective on the day following the election ("effective date"); except that any statute, charter provision, ordinance, or regulation by a public agency enacted prior to January 1, 2007, that limits the price a rental property owner may charge a tenant to occupy a residential rental unit ("unit") or mobile home space ("space") may remain in effect as to such unit or space after the effective date for so long as, but only so long as, at least one of the tenants of such unit or space as of the effective date ("qualified tenant") continues to live in such unit or space as his or her principal place of residence. At such time as a unit or space no longer is used by any qualified tenant as his or her principal place of residence because, as to such unit or space, he or she has: (a) voluntarily vacated; (b) assigned, sublet, sold or transferred his or her tenancy rights either voluntarily or by court order; (c) abandoned; (d) died; or he or she has (e) been evicted pursuant to paragraph (2), (3), (4) or (5) of Section 1161 of the Code of Civil Procedure or Section 798.56 of the Civil Code as in effect on January 1, 2007; then, and in such event, the provisions of this Act shall be effective immediately as to such unit or space.

EXHIBIT B

Shute, Mihaly & Weinberger LLP
Regulatory Takings Experience

Shute, Mihaly & Weinberger LLP has extensive experience in regulatory takings litigation. Takings cases for which the firm or its attorneys have been lead counsel¹ include:

- *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 232 (2005).^{*} The firm served as lead counsel to the City in this case in the United States Supreme Court. This case unsuccessfully challenged the constitutionality of the City of San Francisco's hotel conversion ordinance and also established a broader rule requiring takings claims against local government agencies to be litigated in state court, thus promoting local control of land use. The case also involved a prior decision *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095 (9th Cir. 1998) in a related case and a companion case that was litigated through the California appellate courts. *San Remo Hotel v. City & County of San Francisco*, 27 Cal.4th 643 (2002). The California Supreme Court decision established standards for development impact fees and other types of exactions.
- *Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). The firm won a major victory on behalf of the Tahoe Regional Planning Agency (TRPA) in a regulatory takings case brought by over 400 hundred property owners. The Supreme Court's landmark decision held that temporary planning moratoria do not constitute a per se taking of property, and contains some of the Court's strongest statements to date recognizing the importance of careful land use planning and regulation.
- *Agins v. Tiburon*, 447 U.S. 255 (1980). The firm represented the Town of Tiburon in litigation challenging the Town's downzoning of property for the purpose of open space preservation. The firm defended the Town from the trial court and argued the case in the Supreme Court.
- *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064 (9th Cir. 2003). The firm successfully defended TRPA in another challenge to the Agency's 1987 Regional Plan. This action, brought by Tahoe-Sierra Preservation Council and over 250 individual members of TSPC, alleged that TRPA's implementation of the 1987 Plan effected an unconstitutional taking of their property and violated the Equal Protection Clause of the U.S. Constitution.

¹ An asterisk following a case citation indicates that a partner with the firm appeared in the case while a Deputy City Attorney in the Office of the San Francisco City Attorney.

- *Golden Gate Hotel Ass'n v. City & County of San Francisco*, 18 F.3d 1482 (9th Cir. 1996), *aff'd*, 76 F.3d 386 (9th Cir. 1996).* The court rejected a takings challenge to San Francisco's Residential Hotel Conversion Ordinance.
- *Commercial Builders v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), cert. denied, 504 U.S. 931 (1992). The firm successfully defended the City of Sacramento and the Sacramento Housing and Redevelopment Authority in litigation challenging the City's low-income housing fee on commercial development.
- *De Anza v. County of Santa Cruz*, 936 F.2d 1084 (9th Cir. 1991). The firm successfully defended the County of Santa Cruz against an inverse condemnation action challenging the County's mobile home rent control laws.
- *St. Clair v. City of Chico*, 880 F.2d 199 (9th Cir.), cert. denied, 493 U.S. 993 (1989). The firm successfully defended Butte County in an action filed by a developer of a large residential subdivision against the County and the City of Chico claiming their alleged delay in approving sewage treatment facilities for the project resulted in the developer's bankruptcy and loss of the property.
- *Barancik v. County of Marin*, 872 F.2d 834 (9th Cir. 1988), cert. denied, 493 U.S. 894 (1989). The firm successfully defended the County of Marin against takings and substantive due process challenges to the transfer of development of rights program within its zoning regulations for ranching and agricultural areas.
- *Lake Tahoe Watercraft Recreation Ass'n v. TRPA*, 24 F. Supp. 2d 1062 (E.D. Cal. 1998). The firm successfully defended the Tahoe Regional Planning Agency against a takings claim and other constitutional challenges to TRPA's regulation prohibiting the use of certain polluting watercraft engines. The firm negotiated a favorable settlement after winning dismissal of all constitutional claims.
- *Schulz v. Milne*, 849 F.Supp. 708 (N.D. Cal. 1994).* The federal District Court and in the Ninth Circuit rejected a takings challenge to San Francisco's establishment of neighborhood design review boards.
- *Loewenstein v. City of Lafayette*, 103 Cal.App.4th 718 (2002). Shute, Mihaly & Weinberger successfully represented the City of Lafayette in the City's appeal of a trial court ruling awarding substantial takings damages. The case arose out of the City's denial of a lot line adjustment application, based on a finding that it would have violated the conditions of an existing subdivision. The California Court of Appeal unanimously reversed the trial court's ruling for the landowners on their takings claim.

- *Cwynar v. City and County of San Francisco*, 90 Cal.App.4th 637 (2001).* This case involved a physical takings challenge to a San Francisco ordinance protecting elderly and catastrophically ill tenants from eviction. On remand, the trial court preserved the ordinance and avoided the eviction of vulnerable tenants.
- *Lambert v. City and County of San Francisco*, 57 Cal.App.4th 1172 (1997), *review granted*, 71 Cal.Rptr.2d 215 (1998), *review dismissed*, 87 Cal.Rptr.2d 412 (1999), *cert. denied*, 529 U.S. 1045 (2000) (opinion dissenting from denial of cert. by Justice Scalia, joined by Kennedy and Thomas, JJ.).* The court upheld San Francisco's residential hotel conversion ordinance against a takings challenge.
- *Toigo v. Town of Ross*, 70 Cal.App.4th 309 (1998). The firm successfully represented the Town in an action challenging the denial of a subdivision map application.
- *Guinnane v. San Francisco City Planning Comm.*, 209 Cal.App.3d 732 (1989).* In a landmark case affirming the broad scope of the local police power to regulate land use, the court upheld the City and County of San Francisco' restrictions on residential development to preserve neighborhood character.
- *Terminals Equipment Co. v. City and County of San Francisco*, 221 Cal.App.3d 234 (1990).* The court here rejected a takings challenge to the disapproval of a development application.
- *Smith v. City & County of San Francisco*, 225 Cal.App.3d 38 (1990).* The court rejected a takings challenge to the City's procedure for processing development applications.
- *Leavenworth Properties v. City & County of San Francisco*, 189 Cal.App.3d 986 (1987).* The court rejected constitutional challenges to San Francisco's Condominium Conversion Ordinance.
- *City & County of San Francisco v. Eller Outdoor Adver.*, 192 Cal.App.3d 643 (1987).* The court upheld San Francisco's Billboard Ordinance against a takings challenge and required the removal of 45 billboards from Market Street in San Francisco.
- *Guinnane v. City & County of San Francisco*, 197 Cal.App.3d 256 (1985).* The Court dismissed a regulatory takings challenge to the requirement that development applications undergo environmental review.

In addition to the above cases, the firm has represented public agencies in many regulatory takings cases in state and federal trial and appellate courts where the matter did not result in a published decision.

The firm has appeared numerous times representing amici curiae (friends of the court) on behalf of local governments and agencies in significant cases in the United States and California Supreme Courts, as well as in appellate courts:

- *Lingle v. Chevron, U.S.A.*, 5445 U.S. 528 (2005).* In a landmark case, the U.S. Supreme Court held that regulation is not subject to a means-ends test under the Just Compensation Clause and limited liability for regulatory takings to extreme regulations that destroy virtually all property value. The amicus curiae brief was filed on behalf of the League of California Cities in support of the State of Hawaii.
- *Brown v. Washington Legal Foundation*, 538 U.S. 216 (2003).* In a takings challenge to the State of Washington's program requiring the use of interest on lawyer trust accounts (IOLTA) to provide legal aid, the Supreme Court upheld the program, preserving hundreds of millions of dollars in IOLTA funds for legal services for the poor.
- *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1998).* In a takings challenge to the City of Monterey's regulation of a housing development on the California coast, the Supreme Court decided that juries are available for takings claims in federal court and upheld a jury award of damages against the City. The court also held, however, that the means-ends test for regulation under the Just Compensation Clause was not appropriate in that case. The amicus brief in this case was filed on behalf of numerous California cities and counties.
- *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997). The firm appeared on behalf of amicus curiae League to Save Lake Tahoe in a takings challenge to TJPA's restriction of development of environmentally sensitive parcels in the Lake Tahoe Basin.
- *Yee v. City of Escondido*, 503 U.S. 519 (1992). The firm appeared on behalf of national and statewide mobile-home owner interest groups as amici curiae in support of the City of Escondido in, where the U.S. Supreme Court upheld a rent control ordinance that also limited the ability of a mobile-home park owner to terminate a tenancy. Ruling for the City and amici, the Court held that the contract between a mobile-home owner and a park owner voluntarily establishes a landlord-tenant relationship such that the ordinance did not require the park owner to submit to a physical occupation of his land by the tenant.

- *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). The firm appeared on behalf of numerous California cities and counties as amici curiae in support of the California Coastal Commission in a landmark U.S. Supreme Court case holding that where an individual property owner is forced to dedicate one part of her property in exchange for the right to develop another part, the government must show that the owner's proposed development causes or exacerbates a community problem, and that the land dedication will solve this problem.
- *Equity Lifestyle Properties v. County of San Luis Obispo*, No. 05-55406 (9th Cir. 2007). The firm appeared on behalf of the League of California Cities and the California State Association of Counties as amici curiae in support of the County of San Luis Obispo in a petition for rehearing in the Ninth Circuit Court of Appeals in a case involving a takings challenge to a mobile-home rent control ordinance.
- *Travis v. County of Santa Cruz*, 33 Cal.4th 757 (2004).* The case involved the statute of limitations for facial and as-applied takings challenges to land use controls. An attorney of the firm filed an amicus brief on behalf of the League of Cities in the California Supreme Court and shared oral argument.
- *Landgate v. Cal. Coastal Comm.*, 17 Cal.4th 1006 (1998).* In this case, a developer contended that the California Coastal Commission effected a regulatory taking of its property where the Commission erroneously asserted jurisdiction over a subdivision of the property. An amicus brief was filed on behalf of cities and counties in support of the Coastal Commission, which prevailed against the takings claim.
- *Kavanau v. Santa Monica Rent Control Board*, 16 Cal.4th 761 (1997).* In a takings and due process challenge to a rent control ordinance, the Supreme Court adopted the system for landlord's rights to recover rents proposed by the amicus brief.
- *Ehrlich v. City of Culver City*, 12 Cal.4th 854 (1996).* In a case involving a takings challenge to a development impact fee, an amicus brief was filed on behalf of numerous California cities and counties.
- *Hensler v. City of Glendale*, 8 Cal.4th 1 (1994). The firm appeared on behalf of numerous California cities and counties as amici curiae in support of the defendant City in, in which the California Supreme Court held that a property owner challenging a decision made under the Subdivision Map Act must exhaust administrative and judicial remedies before bringing a takings claim, and any such claim is governed by the Subdivision Map Act's 90-day statute of limitations.

- *City of West Hollywood v. Beverly Towers, Inc.*, 52 Cal.3d 1184 (1991).* In a case involving a constitutional challenge to condominium conversion restrictions, an amicus brief was filed on behalf of the City and County of San Francisco.
- *Milagra Ridge Partners, Ltd. v. City of Pacifica*, 62 Cal.App.4th 108 (1998). The firm appeared on behalf of numerous California cities and counties as amici curiae in support of the defendant City, in which the Court of Appeal held that a property owner's application to amend the City's general plan did not excuse the owner from his duty to apply for a variance in order to present a ripe takings claim.
- *County of Riverside v. Superior Court*, Fourth Appellate District Civil Case No. E024277 (1999). The firm appeared on behalf of the California State Association of Counties and numerous California cities as amici curiae in support of the defendant County in the appeal of, seeking reversal of the trial court's ruling that an untimely and procedurally flawed appeal of a Planning Commission's requirement that a developer build an emergency access road as a condition of approval for a subdivision map was ripe and not time barred.
- *Palmer v. City of Ojai*, 178 Cal.App.3d 280 (1986).* This appeal involved a takings challenge based on the Permit Streamlining Act.

In addition to its experience in regulatory takings, the firm has an extensive practice in eminent domain.